WHOSE LANDS? WHICH PUBLIC?
TRUMP'S NATIONAL MONUMENT PROCLAMATIONS AND THE SHAPE OF PUBLIC-LANDS LAW

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When Secretary of the Interior Ryan Zinke visited Bears Ears National Monument in San Juan County, Utah, in May 2017, he was greeted by supporters whose baseball caps urged, "Make San Juan County Great Again."[1] The demonstrators meant that Secretary Zinke should advise President Trump to revise or revoke the protected status of the 1.35 million acres of federal land that President Obama had designated a national monument in 2016.[2] In a now-familiar political tableau, the red-hats were met by counter-demonstrators supporting the monument: environmentalists, outdoor recreationists, and local indigenous groups. Among the counter-demonstrators were members of the Navajo Nation, who make up a slim majority of San Juan County's population of 16,000 people, but have been restricted by gerrymandering to a permanent 2-1 minority position in an Anglo-dominated, county government that has consistently opposed the Obama monument and other federal land-protection measures by means extending to civil disobedience by elected officials.

About six months later, on December 4, 2017, President Trump issued a proclamation removing approximately 1.15 million acres (about 85 percent) of Bears Ears from monument status and separating the residual monument into two tracts. On the same day, Trump issued a second proclamation reducing the size of Utah's Grand Staircase-Escalante National Monument by 861,000 acres, leaving slightly over a million acres within the monument.[3] The two proclamations potentially opened substantial reserves of oil and gas, uranium, and coal to mining and drilling.[4] Trump's decision thrilled right-wing public-lands activists and their elected allies, who have long opposed federal land management as a usurpation of local control and denounced national monuments, in particular, as abuses of Presidential power. Environmental groups, Native tribes, and the Patagonia corporation, among others, filed suit in federal district court seeking to have the Trump proclamations declared illegal as *ultra vires*.

The courts are crowded with challenges to the Trump Administration's environmental and public-lands policies, which represent, at the least, the biggest rollback of environmental

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[1] *See* Julie Turkewitz, *Battle over Bears Ears Heats up as Trump Rethinks its Monument Status*, N.Y. Times, May 14, 2017, https://www.nytimes.com/2017/05/14/us/bears-ears-ryan-zinke.html.
[2] *See* Coral Davenport, *Obama Designates Two New National Monuments, Protecting 1.65 Million Acres*, N.Y. Times, Dec. 28, 2016, https://www.nytimes.com/2016/12/28/us/politics/obama-national-monument-bears-ears-utah-gold-butte.html.
[3] *See* Presidential Proclamation Modifying the Grand Staircase-Escalante National Monument (Proclamation of President Trump), Dec. 4, 2017, https://www.whitehouse.gov/presidential-actions/presidential-proclamation-modifying-grand-staircase-escalante-national-monument/.
[4] *See, e.g.*, Eric Lipton & Lisa Friedman, *Oil Was Central to Shrink Bears Ears Monument, Emails Show*, N.Y. Times, Mar. 2, 2018; Hiroki Tabuchi, *Uranium Miners Pushed Hard for a Comeback. They Got Their Wish*, N.Y. Times, Jan. 13, 2018 (on opening of potential uranium mining around Bears Ears); Brian Maffly, *Oil and Coal Drove Trump's Call to Shrink Bears Ears and Grand Staircase, According to Insider Emails Released by Court Order*, Salt Lake Tribune, March 2, 2018.

protection since the first Reagan Administration.[5] The dispute over the Trump monument proclamations stands out, however, from a field of litigation that will turn mainly on the adequacy of administrative procedure. The monuments proclamations present a question of judicial first impression concerning the major operational language of the Antiquities Act of 1906. The Act, which was adopted in response to the looting of Native American sites on public lands, authorizes the President to create protected national monuments on federal lands simply by issuing a proclamation doing so.[6] The Act makes no reference to the power that President Trump purported to exercise last December: to shrink or eliminate monuments declared by a predecessor. It is silent on how a national monument, once proclaimed, might be revised or revoked.[7]

The Administration has not yet fully articulated the legal theory of its proclamations in litigation, but its position is adumbrated in the arguments of its supporters, and in the limited set of clear paths indicated by the text and history of the Antiquities Act.[8] The heart of the argument is that the power to revise or revoke monuments is implied in Congress's delegating to the President the power "to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest … to be national monuments."[9] The pro-Administration argument holds that the power to make law generally implies the power to revisit it, whether in withdrawing regulations, repealing legislation, or declaring an end to hostilities.[10] The Administration's interpretation of the Act finds some support in history: in the first fifty years of the Act's existence, presidents made substantial revisions in national monuments, shrinking a few by tens or hundreds of thousands of acres and other (much smaller) ones by large fractions of their total area.[11] Surely, the argument goes, what the Act was long taken to authorize is good evidence of what it authorizes today.

On the other side, the core of the plaintiffs' case against the Trump proclamations is a textual one: The Antiquities Act delegates the power that it names--to "declare" monuments-

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[5] *See, e.g.*, *The E.P.A. Wasteland*, Editorial, N.Y. Times, Feb. 26, 1983 ("To see what has gone wrong inside the Environmental Protection Agency, there is no need to peer through the acrid vapors that stream from its every window…. Seldom since the emperor Caligula appointed his horse a consul has there been so wide a gulf between authority and competence."); Howell Raines, *Reagan Reversing Many U.S. Policies*, N.Y. Times, July 3, 1981 (setting out Reagan Administration's sweeping reversal of environmental enforcement policies).

[6] *See* 16 U.S.C. sec. 431.

[7] In this paper, I treat the kind of substantive revision that the Trump proclamations attempt as presenting the same interpretive question as an outright revocation. The scope of revision power that the Trump Administrations claims in its Bears Ears proclamation--cutting over eighty percent of the monument's acreage and breaking it into two new monuments--suggests a power different only in form from the power of revocation. I do not intend any sleight-of-hand by this elision.

[8] *See, e.g.*, Todd Gaziano & John Yoo, *Presidential Power to Revoke or Reduce National Monument Designations*, forthcoming, 35 Yale J. Reg. (2018) (SSRN version last updated Aug. 15, 2017).

[9] *See* 16 U.S.C. sec. 431.

[10] *See* Gaziano & Yoo, *supra* n. __ at 2, 14-18 (arguing that "a general discretionary revocation power must exist").

[11] *See infra* nn. __ - __ and accompanying text.

-and no more.[12] Congress knew how to grant a two-way power to withdraw or reserve lands reversibly, and did so explicitly in major public-lands statutes from the same period. The Forest Service Organic Act of 1897 authorized the President to "revoke, modify, or suspend" the national-forest status of public lands.[13] The General Withdrawal Act of 1910 (Pickett Act) authorized the President to make "temporary withdrawals" of public land, which, by the statute's terms, remained in effect until revoked by the President or by Congress.[14]

Opponents of the withdrawals also advance several secondary arguments. They point out that the history of early Presidential monument revisions is somewhat offset by a 1938 opinion of the Attorney General concluding that the President may not revoke monuments.[15] They lean on language in the House Report accompanying the Federal Lands Policy and Management Act of 1976 (FLPMA), which describes the Act as "specifically reserv[ing] to the Congress the authority to modify and revoke withdrawals for national monuments created under the Antiquities Act."[16] And they argue that allowing the President to revoke or substantially revise monuments would undermine the Antiquities Act's purpose of permanent protection, which legislative history arguably evinces.[17]

All the secondary arguments against the Trump proclamations are vexed. The 1938 Attorney General's opinion rejecting the Presidential power to revoke monuments acknowledged and did not repudiate substantial prior Presidential revisions of monuments. FLPMA's House Report does not match the text of FLPMA as adopted, which rather puzzlingly prohibited the Secretary of the Interior from modifying or revoking monument proclamations, with no mention of the President.[18] (The Antiquities Act makes no reference to any delegation of power over national monuments to the Secretary.) And the invocation of the Antiquities Act's purpose begs the question of which powers Congress delegated. No one doubts that Congress can reverse even the most protective reservations of public lands by repealing legislation that designates a wilderness area or establishes a national park.[19] Nothing in the super-protective purpose of these original designations prevents their later

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[12] *See* Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment, Case 1:17-cv-02591-TSC, Doc. 21-1 (Jan. 20, 2018) at 24-26 (advancing this plain-language argument); Mark Squillace, Eric Biber, Nicholas Bryner, & Sean Hecht, *Presidents Lack the Authority to Abolish or Diminish National Monuments*, 103 Va. L. Rev. Online 55, 57-59 (so arguing).

[13] Pub. L. No. 2 (1897). [Note it is presented as being to resolve any doubts.] First delegated in the General Revision Act of 1891, the Presidential power to establish national forests by proclamation had, by 1909, been used to designate more than 194 million acres as national forest. See Paul W. Gates, History of Public Land Law Development 580 (1968).

[14] 36 Stat. 847 (1910). The Pickett Act's withdrawal power was repealed, along with most other executive-branch powers of withdrawal and reservation, with the passage of the Federal Land Policy and Management Act of 1976.

[15] *See* Plaintiffs' Motion at 38-40 (so arguing); Squillace et al. at 65-66; Proposed Abolishment of Castle Pinckney National Monument, 39 Op. Att'y Gen. 185, 188 (1938).

[16] H.R. Rep. No. 94-1163, at 9 (May 15, 1976); Squillace et al. at 59-64.

[17] *See* Plaintiffs' Brief at 26-28 (so arguing).

[18] *See* 43 U.S.C. sec. 1714(j) ("The Secretary shall not … modify or revoke any withdrawal creating national monuments under [the Antiquities Act.]").

[19] *See, e.g.*, Wilderness Act of 1964, 16 U.S.C. sec. 1131 *et seq.* (creating framework for establishing wilderness by subsequent legislation); Act of March 1, 1872 (establishing Yellowstone National Park).

reversal. To make the plaintiffs' argument here, one would need an account of why Congress should be taken to have delegated its protective power but not its power to reverse protective designations.

The common limitation of all these arguments is their indifference to the larger structure of public-lands law in which the Antiquities Act operates. The Administration's case that the Antiquities Act's proclamation power should be presumed to be reversible takes its plausibility from its serene generality, lacking any public-lands application or example. But the opponents' argument also falls short of its potential by concentrating on the Act's text and history to the exclusion of the field of public-lands law in which it works. Public-lands law has a normative structure that is highly relevant in determining whether the Trump proclamations are *ultra vires*. It has developed over decades a strong premise of an *asymmetric* Presidential power, a preference for Presidential decisions that bring public land within protected categories, and a corresponding wariness of Presidential actions that unilaterally make formerly protected lands available for drilling, mining, and other privatizing regimes. This asymmetric premise reflects the *structured normative pluralism* of the field--put more plainly, the way it integrates competing purposes and management regimes from a centuries-long series of statutes into a relatively coherent system of governance.

Once lands are placed in specially protected categories such as monument status, the very strong pattern across public-lands law is that only Congress, not the President, may act to open them to extractive privatization.[20] This pattern has developed for three reasons: a worry about precipitate Executive privatization and the possibility of inappropriate motives for such action, a worry sometimes described as corruption; a recognition that extractive uses of land, once authorized, may destroy the land's unique value (scientific, historical, or scenic) and effectively pre-empt Congress's decision whether to preserve that value; and a general policy since FLPMA's adoption in 1976 of concentrating control of public-lands classification in Congress, with the sole exception of the Antiquities Act. While the Act is something of an anomaly in public-lands law in its authorization of unilateral Presidential protection of public lands, interpreting it to authorize the President unilaterally to *strip* lands of protection would create a much greater anomaly.

Each of the opponents' secondary arguments against the Trump proclamations gains force once it is set in this account of public-lands law. Early opinions of the Attorney General articulate the anti-corruption rationale for the asymmetric premise against Presidential

[20] Throughout this paper, I use *privatization* to refer to the creation of vested private claims on public-lands resources, whether through the traditional means of transferring acreage (with or without mineral or water rights) as real estate, or through today's regimes authorizing mining, drilling, and timbering. I sometimes refer to the latter as "extractive privatization," and use "extractivism" to refer to the political position that both advances extractive interests and links them to accounts of national interest or collective identity. My reason for linking rather different regimes under the "privatization" rubric is that they have presented the same core dangers in public-lands law all along, the risk that precipitate or opportunistic Executive-branch transfer of public resources will irreversibly compromise competing values and pre-empt Congress's ultimate authority in governing public lands. For this reason, they play a unified structural role in public-lands law.

privatization. The protective purpose of the Antiquities Act does not itself show that the President cannot strip protected status from national monuments, but it does fit monuments within the field's general reasons for the premise that the President may not unilaterally open lands to extractive privatization. And FLPMA is key to assessing the legality of the Trump proclamations, but not because it provides a specific ban on Presidential reclassification. Rather, FLPMA provides a key stage in the development of the relationship between Presidential and Congressional reclassification of public lands in the twentieth century. Understood in their legal and historical contexts, the Presidential revisions of monuments in the first fifty years of the Act's existence can all be understood as justified on public-lands powers other than the Antiquities Act. None of those powers, however, rested on repudiation of the asymmetric premise against Presidential privatization. Moreover, FLPMA repealed the statutory and doctrinal bases of those powers, leaving the Antiquities Act without supplement from other Presidential power. The key thing about FLPMA is not that it forbade Executive revision or revocation of national monuments, but that it erased the legal landscape on which those actions were once plausible.

A general account of public-lands law has another benefit. It turns out to make space for themes that are vividly present in the Trump proclamations, but which the arguments now on public offer do not find ways to incorporate. As noted earlier, it is widely recognized that the Trump proclamations open the Utah monuments to mining and drilling, and media coverage assumes that this fact bears on the appropriateness of the proclamations. Nonetheless, the entanglement of the Administration's monuments decisions with extractive interests has not made its way into the legal analysis of the case. Yet it is precisely this sort of precipitate and controversially motivated permission for extractive privatization that grounds the asymmetric premise in Presidential power over public lands. Critics' focus on this issue reflects an inchoate normative idea about public-lands governance that, in fact, has footing in the field, once we can see it.

An account of public-lands law also shows the relevance of the culture-wars elements of the Trump proclamations, the right-wing strand of localism that the Administration catered to in its monument decisions. It is hard, in this time of rising dissension and resurgent white nationalism, not to feel it must matter that the Bundy family, an iconic clan of anti-government activists with white-nationalist affiliations, has a hand in the grass-roots pressure to strip protection from the Utah monuments. These considerations might, nonetheless, seem to fall outside the properly legal concerns of the Antiquities Act. On the contrary, however, the public-lands populists' insistence on the priority of private and extractive claims on public resources is not new to public-lands law. It is a recasting of the ideological basis of a major strand of the field, the program of privatization and extraction that, coupled with settler-colonial politics, dominated the governance of public lands for its first century, and continues to play an important role within it. While there is much in this public-lands populism to resist and oppose, for purposes of this analysis the proper response is to recognize its legal familiarity. Extractivism as a political and cultural agenda has a place within the structure of public-lands law, *a place that is cabined by the premise against Presidential privatization*. From the point of view of public-lands law, the public-lands

populists present a reminder that this fight over whose public lands these are, and who counts as "the public" in this field, is internal to this body of law.[21]

The need for judicial interpretation of the Antiquities Act after 112 years highlights another need: for a general account of the body of public-lands law that houses the Act. The law of federal public lands governs nearly thirty percent of the country's land area, including vast mineral and timber wealth and iconic scenic and recreational sites, and implicates divisive environmental questions from the governance of mining to the protection of endangered species.[22] Formed from a palimpsest of statutes adopted between 1785 and 1976, it integrates competing public purposes across deep conflicts over both the value of the natural world and the makeup of "the public" itself. Within an enriched account of the historical development and normative structure of public-lands law, the Trump proclamations cease to seem a plausibly close question and instead emerge as an effort to rework the field in radical ways. Aspects of the Trump proclamations that might at first seem of only political or even narrative interest, such as their catering to extractive interests and their participation in the culture wars around Western public lands, turn out to help show why the proclamations should be held illegal.

In Part I of what follows, I outline the creation and putative revision of the Bears Ears and Grand Staircase-Escalante national monuments. I argue that the Trump proclamations do not support the Administration's presentation of its revisions as merely implementing the Antiquities Act's requirement that monuments occupy the smallest area compatible with protection of the designated objects. Rather, the proclamations revisit and revise the substantive scope of the monuments' protective purposes, and arguably even presuppose a drastic narrowing of the scope of values eligible for protection under the Act. The Trump proclamations thus squarely raise the question of the President's power to revise monuments substantially. In Part II, I describe the Trump proclamation' debt to public-lands populism and outline the ideological field, network of activists and public officials, and vision of "the public" that together generate this program for public lands and create its affinities with President Trump's nationalism. In Part III, I turn to the question of how to interpret the Antiquities Act. After surveying the arguments that have emerged in the current dispute, I propose a framework for understanding public-lands law and locating the question of the President's proclamation power within it. The field displays a structured normative pluralism, integrating competing public-lands goals in definite patterns that enable their coexistence across uses ranging from mining to wilderness preservation. Once public resources are subjected to vested private claims--a reclassification I call *privatization* whether or not it permanently converts federal land into private real estate--these claims survive and are immune to later reclassification. When, however, land is reclassified into a categorically protected status, such as a national park, wilderness, or wilderness study area,

[21] In saying this, I don't mean to normalize the white-nationalist affiliations of certain public-lands activism, nor to set aside the gerrymandering of San Juan County's Navajo population, both of which I return to later in the paper. Here, in a mode of governance that engages these issues only obliquely, public-lands law takes account of the presence of extractivist activists in political decisions while establishing reasons that their agenda should not prevail in this dispute.

[22] *See generally* Paul W. Gates, History of Public Land Law Development (1968) (far-ranging account of the origin, scope, and structure of the public lands and the legal regimes governing them).

only Congress may re-open it to eligibility for new private claims. Finding that the President can reclassify monuments to open them to new private claims would make the Antiquities Act a dramatic departure from the way that public-lands law generally integrates the competing values that bear on public lands. In Part IV, I set out a further and long-standing reason for this structure of public-lands powers: preventing precipitate and potentially opportunistic Presidential opening of public resources to favored constituents--in a word, corruption, which is especially troubling when its effect on protected lands would be irreversible. I argue that this rationale applies to the Antiquities Act and helps to explain the Act's delegation of a one-way power to proclaim monuments, but not to revoke or revise them. In Part V, I turn to the early Presidential monument revisions and show that they took place against a background of expansive claims of Presidential power to reclassify federal land--a power generally articulated and exercised in ways that acknowledged the presumption against Presidential privatization, but which otherwise pushed Executive control over public lands to its limit and perhaps beyond. That claimed power accounts for the plausibility of most of the early revisions in their times. They would not be plausible today as exercises of the delegated power of the Antiquities Act. In Part VI, I briefly recap and conclude.

I. A. THE ANTIQUITIES ACT AND THE TRUMP PROCLAMATIONS

The President's power to create national monuments arises under the Antiquities Act of 1906, which provides,

> That the President of the United States is hereby authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.[23]

National monuments comprise over 15 million predominantly inland or coastal acres (including the contested portions of Bears Ears and Grand Staircase-Escalante), with most of the land area in the mountain West and Alaska, as well as more than 750 million chiefly marine acres.[24] Monuments range from White Sands and portions of the Grand Canyon and the Marianas Trench (including the deepest point in the world's oceans) to the Pullman factory, site of the iconic 1894 strike, and Stonewall, honoring the watershed "riot" against anti-gay police harassment in Manhattan's West Village.[25] Many early national monuments later became national parks, and most current monuments are administered by the National Parks Service, although some are entrusted to the Forest Service, the Fish and Wildlife Service, the Bureau of Land Management, and the Oceans and Atmospherics

[23] 16 U.S.C. sec. 431

[24] *See* https://www.nps.gov/archeology/sites/antiquities/monumentslist.htm (National Park Service inventory of national monuments in order of their dates of creation and size, noting which agencies are responsible for their administration and which have been converted to national parks or otherwise reclassified).

[25] See *id*.

Administration.[26] Although Presidents enjoy considerable discretion in prescribing the management of the monuments they designate, monument status has typically entailed withdrawal from the various privatization schemes that operate by default on public lands, making them eligible for conversion to private real estate (before most such regimes were suspended in 1934, then repealed in 1976) or mining, drilling, and timbering.

A. Bears Ears and Grand Staircase-Escalante

President Obama's 2016 Bears Ears proclamation withdrew the newly designated monument from eligibility for timber sales, oil and gas leases, and mining, along with other federal schemes for private extraction from the public lands.[27] The proclamation also directed the Forest Service and the Bureau of Land Management to govern the Monument in consultation with a pair of advisory committees, one drawn from a set of "local stakeholders" including government officials, landowners, recreational users of the region, business owners, and tribes, the other composed entirely of members of local tribes: the Hopi and Navajo nations, two tribes of the Ute people, and the Zuni tribe.[28] The monument designation thus entailed both substantive changes in land use, particularly limits on extraction, and procedural changes in governance of the region.

President Trump's 2017 proclamation, purporting to remove 1.15 million acres of Bears Ears from monument status and separate the residual monument into two tracts, also restricted the formal input of the local tribal commission to one of the two tracts, re-opened the 1.15 million acres to various federal extraction regimes, and made the residual monument subject to private grazing rights. [29] As described in the Introduction, Trump's simultaneous proclamation reduced the size of Utah's Clinton-era Grand Staircase-Escalante National Monument by 861,000 acres, leaving slightly over a million acres in the monument.[30] The proclamations arose from a review that began in April 2017, when Trump issued an executive order directing Secretary Zinke to review major monument designations made since 1996, with attention to their compatibility with the act's scope (protecting "objects of historic or scientific interest" within "the smallest area compatible" with their protection) and to "concerns of state, tribal, and local governments … including [their] economic development and fiscal condition."[31]

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[26] See *id*.

[27] *See* Presidential Proclamation 9558--Establishment of the Bears Ears National Monument (Proclamation of Pres. Obama), Dec. 28, 2018, https://obamawhitehouse.archives.gov/the-press-office/2016/12/28/proclamation-establishment-bears-ears-national-monument

[28] *See id.* In using the term "nation" and the more archaic and controversial "tribe," I am following the language of the proclamation, which was developed in close consultation with representatives of local indigenous populations.

[29] *See* Presidential Proclamation Modifying the Bears Ears National Monument (Proclamation of President Trump), Dec. 4, 2017, https://www.whitehouse.gov/presidential-actions/presidential-proclamation-modifying-bears-ears-national-monument/.

[30] *See* Presidential Proclamation Modifying the Grand Staircase-Escalante National Monument (Proclamation of President Trump), Dec. 4, 2017, https://www.whitehouse.gov/presidential-actions/presidential-proclamation-modifying-grand-staircase-escalante-national-monument/.

[31] Presidential Executive Order on the Review of Designations Under the Antiquities Act (Executive Order No. 13792, April 26, 2017).

The memorandum that Secretary Zinke produced in response, after criticizing the breadth of "landscape area designation" of protected objects in the Clinton and Obama proclamations, charged these monument reservations with economic harm to local communities that depend on "grazing, timber production, mining," and other land uses that monument proclamations tend to restrict.[32] The memorandum emphasized that, "Local governments raised issues relating to lost jobs and revenue" arising from "the limitations placed on land development … especially when there has been a lack of meaningful consultation and public process before monuments are designated."[33] The recommendations underlying the Trump proclamations thus directed attention to a set of economic and procedural questions that form no part of the Antiquities Act's requirements or even its scope of concern, but which matter a great deal to certain Western constituencies.

B. The Scope of the Trump Proclamations

The Trump proclamations present themselves as implementing the Antiquities Act by enforcing its requirement that monuments include only "the smallest area" compatible with the preservation of protected "objects of historic or scientific interest." If this were correct, the Trump proclamations might not raise the question whether the President can substantially revise or revoke earlier monument designations. They might be justified on a narrower power to adjust the implementation of earlier proclamations without revisiting their substantive judgments. The issue of the President's power to revise or revoke monuments would still be interesting and important, but it would not be squarely presented in the Trump proclamations.

The Trump Administration's characterization of its proclamations, however, is not plausible. They sweep further than that, excluding substantial categories of protected objects from the earlier proclamations. Read in conjunction with Secretary Zinke's underlying memo, they even suggest a reinterpretation of the Antiquities Act itself to restrict its scope of authorized protection to a narrow version of "objects of … scientific interest," excluding much of what monuments protect. Either way, the proclamations are not a ministerial correction within the terms of the earlier proclamations that established the monuments. They can stand only if the President enjoys a full-dress power under the Act to revise or revoke earlier monuments.

There is no disputing that an "object of scientific interest" under the Antiquities Act may be a landscape-scale phenomenon. After 1906, presidents immediately began to treat the Act's "smallest area" requirement as compatible with landscape-scale monument proclamations, including President Theodore Roosevelt's 1908 creation of the Grand Canyon National Monument (more than 800,000 acres) and 1909 proclamation of Mount Olympus National Monument (over 600,000 acres).[34] The Grand Canyon reservation was affirmed by the Supreme Court in 1920, and since then presidential discretion to designate landscape-scale areas as national monuments has been consistently accepted against

[32] *Id.*
[33] *Id.* at 8.
[34] Presidential Proclamation of Jan. 11, 1908, 34 Stat. 225 (Grand Canyon); Presidential Proclamation of March 2, 1909, No. 869, 35 Stat. 2247 (Mount Olympus).

occasional legal challenges.[35] The Court rejected the argument that "there was no authority for [the] creation" of the first Grand Canyon National Monument under the Act, explaining that the canyon was eligible for monument status because, "It … affords an unexampled field for geologic study [and] is regarded as one of the great natural wonders."[36] This embrace of a very broad spatial interpretation of the Act's requirement that monuments be confined to the "smallest area" keys that language to the geological and scenic conceptions of early twentieth century preservation. So interpreted, the "smallest area" may be enormous, so long as it corresponds to a qualifying "object of scientific interest." A monument's permissible size is a function of the size of the object it protects. The "smallest area" requirement implies no restriction of the statute's protection to small objects. This much is long settled.

The Trump proclamations raise the question of what scope of "scientific interest" can anchor landscape-scale preservation. President Obama's proclamation creating the Bears Ears monument spends eight rather fulsome paragraphs describing the area's "diversity of … soils and microenvironments," its many plants (inter alia, low sage, winterfat, cliff rose, greasewood, common mallow, low larkspur, needle and thread, the Kachina daisy, sand verbena, the straight bladderpod, and Durango tumble mustard) and animals (ferruginous hawk, flammulated owl, pallid bat, side-blotched lizard, bobcats and "the occasional mountain lion"), as well as the role of distinctive riparian and mesa settings in assembling these ecological "communities."[37]

The Trump proclamations appear to construe the Antiquities Act as excluding ecological objects from monument protection. The proclamations shrinking Bear Ears and Grand Staircase-Escalante both argue that the original designations exceeded the Act's "smallest area" requirement by reserving more land than was necessary to protect the core geological and archaeological features of the sites.[38] President Trump's Bears Ears proclamation devotes all but two sentences of its discussion of qualifying objects to archaeological and dramatic geological features of the monument, the exception being a set of mesa plant communities that the proclamation identifies as unique to the site.[39] Much of the ecological basis of the Obama declaration appears to fall by implication under the Trump proclamation's announcement that, "Some of the objects Proclamation 9558 identifies are not unique to the monument, and some of the particular examples of these objects within the monument are not of significant scientific or historic interest."[40] The Trump proclamation continues, "Moreover, many of the objects Proclamation 9558 identifies were not under

[35] *See* Cameron v. United States, 252 U.S. 450 (1920); Tulare County v. Bush 306 F.3d 1138 (2002) (affirming broad scope of Presidential discretion, including eligibility of ecosystems for protection).
[36] *Id*.
[37] http://www.presidency.ucsb.edu/ws/?pid=119941
[38] *See supra* n. __ [and passages therein].
[39] https://www.whitehouse.gov/presidential-actions/presidential-proclamation-modifying-bears-ears-national-monument/ ("The Indian Creek area [one of the two remnant monuments left by the Trump proclamation] also includes 2 prominent mesas … which are home to relict plant communities … that exist only on these isolated islands in the desert sea and are, generally, unaltered by humans.")
[40] https://www.whitehouse.gov/presidential-actions/presidential-proclamation-modifying-bears-ears-national-monument/

threat of damage or destruction before designation such that they required a reservation of land to protect them."[41] (There is no statutory requirement that Antiquities Act proclamations identify objects that are "under threat of damage or destruction.") The Administration's view of the Act appears to be that qualifying objects do not include ecosystems, plant communities, etc., except where these are unique or hold extraordinary scientific interest for some other reason.

Similarly, President Clinton's proclamation of the Grand Staircase-Escalante monument devoted one of five paragraphs (and about a third of its total words) to describing among its qualifying objects the area's varied "life zones" of soils, flora, and fauna.[42] President Trump's proclamation purporting to shrink the monument in pursuit of the "smallest area" requirement makes no reference to ecology or biodiversity, instead devoting its discussion of qualifying objects (fourteen paragraphs, though not much longer in sum than the Clinton proclamation) to geological, paleontological, archaeological, and historical features of the area.[43] The Trump proclamation does note the prior proclamation's attention to "animal and plant species" and observe that the "revised boundaries contain the majority of the habitat types originally protected," but gives no indication that it regards this partial continued protection as legally obligatory, and indeed appears to claim that these are, by and large, not qualifying objects, being neither unique nor "under threat or damage or destruction."[44]

The Trump proclamations, then, implicitly propose a reinterpretation of the Antiquities Act. They recast the definition of objects qualifying for protection, returning to a historical core of geological and archaeological objects, restricting current plant and animal communities to those that are unique to the protected site, and adding (at least in some applications) a requirement that protected objects be under threat of damage or destruction. This direction is signaled in Secretary Zinke's memorandum proposing the revisions, in which he criticizes prior proclamations for protecting "objects not clearly defined," such as "geographic areas including viewsheds and ecosystems."[45] Zinke also described recent constructions of the Act's "object" and "smallest area" requirements as "either arbitrary or likely politically motivated" and complained that the resulting monuments' "boundaries could not be supported by science or reasons of practical resource management."[46]

Maybe this is an over-reading, and the Trump proclamations do not presuppose what the Zinke memo suggests, that the Antiquities Act requires their restriction in the field of protected objects. Maybe the President simply took it on himself to exclude a great deal of what the Clinton proclamation and, especially, the Obama proclamation designated as protected objects. If that is the case, the new monument boundaries, especially in Bears Ears, do not plausibly delimit the "smallest area" necessary to protect the objects that President

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[41] *Id.*
[42] https://www.whitehouse.gov/presidential-actions/presidential-proclamation-modifying-grand-staircase-escalante-national-monument/
[43] *See* https://www.whitehouse.gov/presidential-actions/presidential-proclamation-modifying-grand-staircase-escalante-national-monument/
[44] *Id.*
[45] Zinke memorandum, p. 7.
[46] *Id.* at 2.

Obama designated as of scientific or historic interest. They delimit an area fitted to a *new* set of protected objects, one substantially smaller and qualitatively different from Obama's.

There is no good reason to accept that President Trump's monument reductions are, as the Administration contends, adjustments of the monuments' sizes to the "smallest area" that preserves their protected objects. The reductions are, rather, a substantive revisiting of which objects within the monuments deserve or are eligible for protection.[47] They can be justified only by a full-dress power to revise or revoke earlier monument proclamations.

I next turn in Part II to the political context and ideological drivers of the Trump proclamations before engaging, in Part III and thereafter, the question of how best to interpret the Antiquities Act.

II. THE TRUMP PROCLAMATIONS AND PUBLIC-LANDS POPULISM

The shift in statutory interpretation signals the elevation of a specific set of local extractive and other traditional land uses in public-land law. As noted a bit earlier, the Trump executive order and resulting Zinke memorandum, which together underlie the Trump proclamations, emphasize the effects of monuments on local economies and the level of local feedback and support for monument designations. What is striking is the memorandum's premise that these concerns, which do not figure in the Act itself, should carry special weight in its implementation. The Zinke memorandum takes a particularly sharp tone of advocacy. Zinke observes that, although the monument designations under review were sometimes preceded by public meetings, "these meetings were not always adequately noticed to all stakeholders and instead were filled with advocates organized by non-governmental organizations to promote monument designations. (It is worth noting that this dynamic is similarly reflected in the public comment process for this review.)" [48] The memorandum goes out of its way to rebut the putatively pre-programmed views of monument supporters, asserting that their view that "monument designation [can] prevent the sale or transfer of public land … is false and has no basis in fact," while faithfully transmitting the views of monument opponents, "often local residents," whose concerns were unfortunately swamped by "a well-orchestrated national campaign organized by multiple organizations."[49]

So the Zinke memorandum and the Trump proclamations are pieces of advocacy. So what? After all, the Clinton and Obama proclamations are somewhat more elegantly crafted pieces of advocacy for their monument designations. The point is that the Trump Administration's advocacy, particularly that of the Zinke memorandum, ties a narrowed interpretation of the Antiquities Act's scope to a particular conception of whose views count with respect to these public lands--who forms the relevant public. The memo presents previous administrations' decisions as legally erroneous and in bad faith ("arbitrary or likely

[47] Because the Trump proclamations do not argue in as many words that ecological reservation falls outside the text of the Antiquities Act, it may be more accurate to say that the proclamations reclassify the monuments' ecological features as undeserving of protection, though the more ambitious interpretation lurks in the background.

[48] *Id.*

[49] *Id.* at 2-3.

politically motivated"), and in the service of an environmentalist constituency that lacks the right sort of concrete attachment to the place. The memorandum suggests, though it does not actually argue, that local communities (characterized as extractive or other traditional economic resource users) should retain a veto over landscape-scale designations: "Despite the apparent lack of adherence to the purpose of the Act, some monuments reflect a long public debate process and are largely settled and strongly supported by the local community. Other monuments remain controversial…"[50] The implication appears to be that landscape-scale monuments that "remain controversial" with the appropriately defined local community must lack a proper basis in either statutory authorization or political legitimacy, and should be returned to the "vigorous public balancing processes" of multi-use planning that leave more room for economic uses of public lands.[51] The pieces of this argument interlock: the Act is interpreted in a fashion that limits the President's authority to protect ecological values by limiting extractive uses of public lands. In turn, an interest in extractive uses helps to define which local land users count as the "public" in the Administration's account. And that public, in turn, occupies a privileged place in determining the validity of monument designations, not just in the initial process, but thereafter, with its current support or opposition key to assessing a prior monument proclamation.

A. Public-Lands Populism and Extractivist Nationalism

While issuing his proclamations in Salt Lake City, Utah, President Trump delivered a brief address on control of federal public lands. He denounced "abuses of the Antiquities Act [that] give enormous power to faraway bureaucrats at the expense of the people who actually live here, work here, and make this place their home … where they raise their children … the place they love."[52] The Obama and Clinton monuments, he said, had brought "harmful and unnecessary restrictions on hunting, ranching, and responsible economic development," preventing ranching families from "passing on their businesses and beloved heritage to the children."[53] Trump continued, "These abuses of the Antiquities Act have not just threatened your local economies; they've threatened your way of life. They've threatened your hearts."[54] Future land management, he promised, would "give back your voice," prioritize "the local communities that knows [sic] the land the best and that cherishes the land the most," and make public land open "to public use."[55]

Trump's remarks highlight a key aspect of his monument proclamations: the embrace and elevation of a long-running strand of Western politics. This politics, which I will call *public-lands populism*, contests the question of whose lands the federal public lands should be--that is, whether they should be federally administered, transferred to state and local control, or privatized. Like all populism, it also contests the question of just who count as part of "the public." Its answers have consistently favored state and local control; extractive policies such as mining, drilling, and timbering; and political, material, and symbolic

[50] *Id.* at 2.
[51] *Id.* at 8.
[52] Remarks by President Trump on Antiquities Act Designations, Dec. 4, 2017, Salt Lake City, UT, https://www.whitehouse.gov/briefings-statements/remarks-president-trump-antiquities-act-designations/.
[53] *Id.*
[54] *Id.*
[55] *Id.*

primacy for local landholders and employees in the extractive industries, who figure in this populist "public" as hardworking, upright, and white. These positions align with the interests of the mining, drilling, and timbering industries, although these enterprises are invisible in the imagery of public-lands populism, except when they touch down as "work" or "economic development." This set of views has circulated for decades in rural and activist networks and finds more formal development in intermittent litigation by local governments and property-rights organizations such as the Pacific Legal Foundation.[56]

In elevating these themes, Trump moved to incorporate public-lands populism into the larger themes of his administration's recasting of nationalism. [57] Trumpist nationalism has an economic dimension, which often finds expression in a neo-mercantilist rhetoric (and, at the time of writing, increasingly aggressive) policy of zero-sum competition among national economies. This orientation has resonated in environmental and natural-resources law with the administration's embrace of "energy dominance" as the slogan for its program of offshore oil-drilling and other regulatory moves toward cheaper and faster extraction of fossil fuels.[58] The domestic face of economic nationalism has been a politicization of economic and environmental policy to support a favored set of traditionally blue-collar extractive and manufacturing industries, perhaps most saliently Appalachian coal-mining.[59]

Trump's nationalism is deservedly notorious for its ethno-cultural dimension, which has increased the political salience of immigration, race, and religion, in the course of tying renewed American "greatness" to nativism, whiteness, and the putative superior dignity of certain kinds of manual and mechanical labor.[60] Extractive labor and other traditional resource uses are a meeting-place of the ethno-cultural dimensions of Trumpist politics with its orientation to "energy dominance." A right-wing politics of recognition has crystallized around some of the industries and types of work that are most closely implicated in public-lands and environmental policymaking. These themes were deliberately personified in the

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[56] https://pacificlegal.org/plf-urges-administration-reverse-antiquities-act-abuses/

[57] In my discussion of Trump's nationalism, I am influenced by Jan-Werner Muller's formulation of "populism," which escapes various fuzzy tropes (anti-elitism, etc.) to home in on a form of political appear that identifies the normative character of the nation, the "true" nation, with a sub-set of the actual population, thus making possible various antidemocratic, majority-trumping or illiberal, minority-subordinating moves on behalf of the "true" people. *See* Jan-Werner Muller, What Is Populism? (2016). A characterization of how one qualifies as a member of that elect is thus essential; public-lands populism trades on such an account, emphasizing the local, rural, hardworking/extractive, and implicitly or explicitly Anglo character of its actual and ideal constituencies.

[58] *See* Lisa Friedman, Trump Moves to Open Nearly All Offshore Waters to Drilling, N.Y. Times, Jan. 4, 2018 (detailing offshort drilling announcement and quoting Interior Secretary Ryan Zinke to the effect that, "[T]he drilling plan was part of 'a new path for energy dominance in America[.]'").

[59] *See, e.g.*, Brady Dennis & Juliet Eilperin, *EPA Chief Scott Pruitt Tells Coal Miners He Will Repeal Power Plant Rule Tuesday: "The War on Coal Is Over,"* Wash. Post, Oct. 9, 2017 (describing EPA Administrator's denunciation of Obama-era coal policies in the course of announcing reversal of Clean Power Plan);

[60] *See, e.g.*, David Leonhardt & Ian Prasad Philbrick, *Donald Trump's Racism: The Definitive List*, N.Y. Times, Jan. 15, 2018 (detailing President Trump's long history of making racist appeals); Ta-Nehisi Coates, *The First White President*, The Atlantic, Oct. 2017 (arguing that Trump's racial appeal, directed against Barack Obama's presidency, constitutes a new expression of white nationalism in U.S. politics).

ranchers and laborers that Trump invoked in his national monuments declaration and the coal miners who joined Environmental Protection Agency Director Scott Pruitt when he traveled to Hazard, Kentucky, the traditional heart of Appalachian coal mining, to announce the withdrawal of the Obama administration's Clean Power Plan.[61]

B. Public-Lands Populism: What and Who It Is

Public-lands populism combines its substantive priorities for use of federal lands with a dissenting constitutional account of authority over those lands and, in some cases, a racialized picture of the relevant "public." These themes link populist agitation across decades and topical flashpoints as well as counties and states, providing a flexible but unifying set of tropes for anti-federal and anti-regulatory politics.[62]

1. The Ideological Orientation of Public-Lands Populism

Public-lands populism's adherents frequently voice a constitutional and historical narrative about Western public lands: Congress ought to have privatized these lands or turned them over to the states, as it did with Eastern and Midwestern acreage.[63] Its failure to do so is not just dereliction, but usurpation: the Constitution's Property Clause authorizes only "rules and regulations" governing the disposal of federal lands, not their permanent retention and management.[64] Permanent federal land requires the consent of the state in which the land is set and federal purchase of that land.[65] All federal public land, then - nearly seventy percent of Utah, for instance - represents an illegal form of domestic colonialism, in which lands and resources that should be controlled by state governments and local residents are instead ruled from Washington, subjecting local resource users to unaccountable bureaucratic oversight and relative poverty in a rich terrain.[66] These arguments for the constitutional illegitimacy and historical injustice of federal reservations are aligned with accounts of the political and scientific illegitimacy of resource preservation. Denial of anthropogenic climate change is a recurrent theme in these networks, as is the view that

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[61] *See supra* n. __.

[62] In this description, I mean to emphasize that I am not describing merely a "protest" movement, and, indeed, that such an image implies a false picture. Protest of the kind I am describing here advances an alternative account of legality, and in that sense is jurisgenerative. *See, e.g.*, Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. Pa. L. Rev. 927 (2006) (describing the role of social movements in opening up settled points of interpretation in legal culture and bringing new, or old, commitments to previously settled debates); Robert M. Cover, *The Supreme Court, 1982 Term--Foreword: Nomos and Narrative*, 97 Harv. L. Rev. 4 (1983) (exploring the "jurisgenerativity" of non-legal actors, such as messianic religious communities and radicals of various stripes).

[63] *See, e.g.*, Michael S. Coffman, *Powerful Forces: More than a Century of Eastern Control of the West's Natural Resources*, Range Magazine, Fall 2016 at 16, 16-19 ("The U.S. cannot 'own' this land constitutionally, even though it claims it does. Upon entering the United States the new western states should have been given land not claimed by the settlers.")

[64] *See, e.g.*, Michael S. Coffman, *Original Intent*, Range Magazine, Summer 2016, at 14, 14-17 (so arguing).

[65] *See id.*

[66] *See, e.g.*, Coffman, *Powerful Forces*, *supra* n. __ ("An incredible war between the federal government and western ranchers has been going on since 1891, mostly under the radar, pushed and funded by powerful northeastern progressive financiers and industrialists…. It has led to a very corrupt legal system that tragically has no fidelity to the restrictions imposed by the U.S. Constitution.").

wild-lands preservation and non-motorized outdoor recreation are the pet agendas of small but wealthy coastal elites, which capture the political process to engineer "land-grabs" such as the controversial monument proclamations.[67] While none of this constitution-in-exile theory appears in the official documents of the Trump Administration, it may exercise an gravitational tug, helping to account for denunciations of landscape-scale protection and of federal management of natural resources that some local interests would prefer to use differently. The more concrete commitments of public-lands populism, as we have seen, are front-and-center in the substance and rhetoric of the Administration's monuments proclamations.

2. The Networks of Public-Lands Populism

This ideology connects lawmakers with lawbreakers in a circuit of dissent and affirmation. For instance, Ammon Bundy, the leader of the notorious 2016 occupation of the Malheur Wildlife Refuge in southeastern Oregon, recently joined elected San Juan County officials in a favored form of protest: riding all-terrain vehicles into areas of federal lands that land-management agencies have closed to motorized traffic, frequently while armed.[68] The state legislatures of both Utah and Nevada have passed resolutions endorsing the constitutional theories and land-management agendas of the movement, and Utah's now-retiring Senator Orrin Hatch has long been regarded as a protector at the federal level.[69] It was San Juan county commissioner Calvin Black, not a militia member, who announced at a BLM hearing in 1979, "We had enough of you guys telling us what to do. I'm not a violent man, but I'm getting to the point where I'll blow up bridges, ruins, and vehicles. We're going to start a revolution. We're going to get back our lands. We're going to sabotage your vehicles. You had better start going out in twos and threes because we're going to take care of you BLMers."[70] Black's threats came amid the 1970s blooming of this ideology that is often called the Sagebrush Rebellion, which counted among its allies presidential candidate Ronald Ronald Reagan and his first-term Interior Secretary, James Watt.[71] The Sagebrush Rebellion was the incubator for later resistance to monument proclamations, and was itself

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[67] Michael S. Coffman, *Hope! Need Reform Could Be Coming to the EPA Swamp*, Range Magazine, Summer 2017 at 10-12 (describing EPA as "probably the most corrupt agency in the federal government" and asserting that, although "Very few urbanites understand the depth of its corruption and list for more and more power that's at the heart of the EPA…. President Trump does"); Coffman, *Climate Racketeering*, Range Magazine, Winter 2017 at 14, 15-16 ("hard empirical evidence strongly suggests that man's use of fossil fuel has little to do with global warming"); Dave Skinner, *Unforgettable*, Range Magazine, Spring 2017 at 18, 19 (welcoming Trump's election by recalling the Clinton Administration's "post-Grand Staircase orgy of national monuments designations");

[68] *See* Jonathan Thompson, *A Reluctant Rebellion in the Utah Desert*, High Country News, May 13, 2014 (detailing Bundy involvement in motorized trespass protest and arrest of county commissioner).

[69] *See* Raymond Wheeler, *War on the Colorado Plateau*, High Country News at 16, 17-18 (Sept. 12, 1988) (describing Utah Sen. Orrin Hatch's patronage of the so-called Sagebrush Rebellion and see-sawing of BLM land-use agendas between Carter and Reagan Administrations); [Resolutions on public lands].

[70] *See* Raymond Wheeler, *War on the Colorado Plateau*, High Country News *supra* n. __at 17-18 (Sept. 12, 1988) (reporting the April 12, 1979 statement of San Juan County Commissioner Calvin Black).

[71] *See* R. McGreggor Cawley, Federal Lands, Western Anger: The Sagebrush Rebellion and Environmental Politics 71-91 (1993) (tracing the origins and effects of the Sagebrush Rebellion of the mid-1970s and 1980s).

a recasting of a long-standing set of anti-regulatory themes that run back to the very beginning of federal withdrawals of public land.[72]

3. Which Public? Inclusion and Exclusion

As with all localism, these claims involve not just assertions of the local against the national, but a bid by certain members of the local population to exercise legal control in the name of "the community," often in the course of dominating or disregarding other locals.[73] (Regions and locales are imagined communities and products of political construction, as nations famously are.) While the surface dispute is between public-lands populists and recreational land users, a story that has often been described in terms of class and ethos, racial identity has also been a persistent feature of public-lands populism. This has been particularly clear around the Bears Ears monument. In the same month that President Trump invoked local control in announcing the monument's shrinking, a federal district court ruled unconstitutional San Juan County's longtime practice of packing voters from its Native American majority into one of three county commission districts, rendering those voters a permanent minority in a county government that has been a major platform for public-lands populism.[74] One of the county commissioners now appealing the ruling was Ammon Bundy's companion on ATV incursions into closed land, while six of seven local Navajo elected bodies endorsed the Obama monument.[75] *Range* magazine, which is widely circulated in the region and a major vehicle of public-lands populism, has characterized the Bears Ears monument proclamation as a brew of "white billionaires, brown astroturf, [and] green monuments," and describes Utah Dine Bikeyah, a Native organization involved in the monument's planning, as a "`brown' Astroturf front for the usual handful of major, multi-billion-dollar Green foundations."[76] The restriction of Navajo representation in county government and the denial that pro-monument Native American voices are more than conservationists' catspaws chime with a more material erasure: in the early Sagebrush era, the first major act of political trespass by public-lands populists was the mechanical destruction of an entire wall of Native American pictographs. The question of whose land the public lands are gets figured in public-lands populism as an issue of scale--local people

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[72] *See, e.g.*, 7 Cong. Rec. 1719-23, 1861-69 (1878) (Congressional attacks on Interior Secretary Carl Schurz's early efforts to limit private commercial timbering on federal land); *id.* at 1722 (Statement of Sen. Blaine) ("I know of nothing in the world to parallel it except that great assertion in our immortal Declaration of Independence that the King of England 'has erected a multitude of new offices, and sent hither swarms of officers to harass our people, and eat out their substance.'"); *id.* (Statement of Sen. Teller) ("I claim that nothing is demanded by the people in the Territories now that has not been conceded to all settlers in the [previous] new Territories."); *id.* at 1721 (Statement of Sen. Blaine) ("[T]he hardy pioneer who goes forth and bears the flag of civilization onward … shall have the air and the water and the wood….").

[73] *See, e.g.*, Muller, *supra* n. __ (discussion of exclusionary forms of appeal to political identity).

[74] *See* Julie Terkowitz, *For Native Americans, a "Historic Moment" on the Path to the Power of the Ballot Box*, N.Y. Times, Jan. 4, 2018, https://www.nytimes.com/2018/01/04/us/native-american-voting-rights.html.

[75] *See* Jonathan Thompson, *A Reluctant Rebellion in the Utah Desert*, High Country News, May 13, 2014 (detailing Bundy involvement in motorized trespass protest and arrest of county commissioner).

[76] *See* Dave Skinner, *Monumental Megabucks*, Range Magazine, Winter 2017, at 48-50. *Range* claims a readership of 170,000 half of them Western farmers or ranchers. *See* Jennifer Percy, *Fear of the Federal Government in the Ranchlands of Oregon*, N.Y. Times, Jan. 18, 2018.

versus the national "People." In practice, however, it turns out to be just as much a dispute over the composition of "the public" in public lands--who is treated as a normative member of the political community, and on what grounds.

This is where public-lands populism connects most squarely with Trumpist white nationalism. The concern to de-legitimate the Native American presence in the West interacts with other threads of that nationalism: *Range* has interrupted critiques of monument designations to warn against "a Hispanic Advisor" of John McCain's, who allegedly advocated a "sovereignty-surrendering" opening of borders to "a free flow of people."[77] Cliven Bundy, Ammon Bundy's father and an iconic figure in public-lands populism, has said of African-Americans, "I've often wondered, are they better off as slaves, picking cotton?"[78] Shortly before the Bundy-led occupation of the Malheur Wildlife Refuge in southeastern Oregon, one of his fellow occupiers posted a video of himself burning pages of the Koran wrapped in bacon.[79] Closing a loop with the first post-FLPMA attacks on preserved public lands in southern Utah, which involved defacing indigenous artifacts, the Malheur occupiers turned a Native American archaeological site into a latrine.[80] The ambition to define the "public" in public lands in very racially specific ways infuses this politics, even though it is often sub-text in the insistence on extractive and other masculine activities and vested property claims that conjure up the settler-colonial history of public-lands law.

C. Contending with Public-Lands Populism

How, if at all, should courts engage the role of public-lands populism and Trumpist nationalism in the challenged monuments proclamations? David Strauss suggests in a recent essay that judges might appropriately take account of discriminatory motives outside the usual evidentiary ambit of a case when they suspect they are confronting an Administration that is engaged in "[a]n attack on liberal democratic norms."[81] Strauss offers the example of recent decisions taking account of President Trump's anti-Muslim campaign rhetoric in assessing his "travel ban" and suggests that, in light of the Administration's illiberal posture, judges' seeking to "push the limits of the law" can be "[i]n a deep way … a lawful thing to do."[82] I feel the appeal of the thought that on some combination of constitutional and policy grounds a court might decide against the President's asserted power to revise or revoke monuments, rather than facilitate decisions that seem aimed at heating up culture wars in racially inflected ways. I am also wary of the difficulty in generating an administrable standard for this goal that could get very far in evaluating public-lands decisions. In any event, the effort is not necessary because another way is open. More conventional resources in public-lands law help to show the invalidity of the public-lands populist claim. To put these to use, however, we first have to excavate them.

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[77] *See* Tim Findley, *Dust Devils*, Range Magazine, Summer 2008, at 31, 37 ("sovereignty-surrendering" is the author's phrase, "free flow …" the phrase he attributes to McCain's staffer.
[78] *See* Adam Hochschild, *Bang for the Buck*, N.Y. Rev. of Books at 4, 6 (April 5, 2018).
[79] *See id.* at 8.
[80] *See id.*
[81] David Strauss, *Law and the Slow-Motion Emergency*, *in* Can It Happen Here? 363, 365 (Cass Sunstein, ed., 2018)
[82] *Id.* at 366.

III. INTERPRETING THE ANTIQUITIES ACT ON THE TERRAIN OF PUBLIC-LANDS LAW

On their face, all the major arguments now in play for and against the Trump proclamations have some plausibility. The text of the Antiquities Act can support the view that it withholds the power of monument revision or revocation from the President, and also the view that it implicitly grants that power. The early decades of Presidential practice under the Act seem to support a power of revision, but that practice was never tested in court, and stands in some tension with the Attorney General's 1938 opinion denying any Presidential power to revoke monuments. Both the preservationist goals of the Antiquities Act and the general policy of FLPMA, which concentrates power to reclassify lands in Congress, may weigh against the President's claim of a unilateral policy to strip protection from monuments. Neither of these arguments, however, clearly carries the day.

One can get a great deal more traction on the question by locating it within the larger landscape of public-lands law. In this Part, I first briefly rehearse the arguments as others have developed them, then turn to developing an account of public-lands law as the interpretive frame for the question.

A. Text versus History: For and Against the Trump Proclamations

The straightforward case that the President may not revoke or substantially revise earlier monument proclamations rests on the text of the act itself. The Antiquities Act authorizes the President to "declare" national monuments, but makes no mention of revising or revoking earlier monument proclamations.[83] The first premise of textual interpretation is that a statute should be read to say only what it says, and no more. On this account, the Antiquities Act confers only the power it names: a one-way power to withdraw and reserve public lands, but no power to reverse those actions. On this account, the Trump proclamations are lawless usurpation.

Textualist interpretation seeks to enforce rule-of-law values of predictability and accountability by inhibiting ("preventing" seems optimistic) judges and other interpreters from inventing convenient commands to implement and reading them into statutes. This posture invites use of certain interpretive razors, signally *expressio unius*, the presumption that a statute's stating one thing implies its exclusion of things not stated. The textual argument against the Trump proclamations is that the Antiquities Act does not do what it does not say.

But what does it say? What meaning is fairly attributable to a statute that confers a power without reference to its potential obverse? The *expressio unius* canon has not produced a rule of statutory construction to the effect that a grant of power is one-way unless a power of reversal is explicit. Examples to the contrary are ordinary enough that Yoo and Gaziano propose the opposite: a "general principle … that the authority to execute a discretionary government power usually includes the power to revoke it--unless the original grant expressly limits the power of revocation."[84] Their examples mainly concern constitutional powers--Congress's power to repeal a statute, the President's power to remove

[83] *Supra* n. __.
[84] Yoo & Gaziano at 7.

a discretionary appointee--as well as the power of agencies to withdraw previously issued regulations.[85] It is commonsensical to suggest, as they do, that government could not go on if today's officials were generally bound by the actions of their predecessors (or their own earlier acts), either as a bare functional matter or as a matter of legitimacy as new public attitudes and elections put new tasks on the agenda of government and remove others. They give no reason to think, however, that these considerations should produce a uniform rule of interpretation for all congressional grants of power to the President.

The textualist strategy takes support from both predictability and democratic legitimacy inasmuch as its advocates can say in good faith, "Congress knew how to grant the President a power to revoke or revise monuments, and it didn't do so here."[86] In this case, that claim has historical weight. The Antiquities Act's silence on the reversal of monument proclamations is in contrast to two major contemporaneous public-lands statutes. The Forest Service Organic Act of 1897, which authorized the President to create national forests on federal lands and also "reduce the area … or … vacate altogether any order creating such reserve."[87] The 1897 Organic Act revised an 1891 authorization of the President to reserve national forests that lacked any reference to revision or revocation. Representative John Lacey, who would become the sponsor and architect of the Antiquities Act, argued in floor debate that the Organic Act's revocation power was necessary because the 1891 act gave the President "power to create a reserve, but no power to restrict or annul it, and there ought to be such authority vested in the President."[88] Similarly, the General Withdrawal Act of 1910, passed in response to a request from President Taft to clarify his power in this respect, authorized the President to withdraw federal land temporarily from privatization for public purposes, and stated that such a withdrawal would remain in effect until either the President or Congress revoked it.

Apart from the argument that grants of power should be presumed to include the powers of revocation and revision, the case for the legality of the Trump Administration's proclamations rests mainly on presidential practice in the decades after the Antiquities Act was enacted. Orders shrinking monuments went unchallenged in the early and middle decades of the twentieth century. Most dramatically, President Wilson in 1915 cut 313,280 acres from President Roosevelt's 639,200-acre Mount Olympus monument.[89] President Truman cut 4,700 acres from Santa Rosa Island National Monument, which had been established at just over twice that size by President Franklin Roosevelt, and President Eisenhower cut 8,920 acres from the Great Sand Dune National Monument.[90] Smaller

[85] [cite]
[86] [E.g., …]
[87] Sundry Appropriations Act of 1897, Act of June 4, 1897, ch. 2, 30 Stat. 36.
[88] 29 Cong. Rec. 2677 (1897) (Statement of Rep. Lacey).
[89] Proclamation of May 11, 1915, 39 Stat. 1726 (transferring portions of Mount Olympus National Monument to management as national forest).
[90] Proclamation of August 13, 1945 (No. 2659) (finding that the lands removed from the monument were "now needed for by the War Department for military purposes" and that their elimination from the monument "would not seriously interfere with its administration"); Proclamation of June 7, 1956 (No. 3138) (finding that "retention of certain lands within the monument is no longer necessary" for "the

monuments revision were often to accommodate conflicting private claims under then-extant homesteading laws, and no substantial presidential reduction took place between 1956 and 2017.

I'll return later to the details and importance of these early Presidential revisions, as they do reveal something important about the operation of the Antiquities Act in its first fifty years--to wit, the larger terrain of public-lands law where it had its effect. These revisions, it turns out, do not provide the vindication for the Trump proclamations that the Administration's supporters claim once they are understood in the context of their time and purposes.

B. Locating the Antiquities Act Question Within Public-Lands Law

The main limitation of all these arguments, on both sides of the dispute over the Trump proclamations, is that they proceed with little attention to the distinctive character of public-lands law. Arguments of general principle or context-free precedent look very different when placed within this important and theoretically neglected field of public law. Public-lands law displays a structured normative pluralism. It integrates a range of competing values: privatization and extraction; motorized recreation and hunting; scenic preservation, hiking, and solitude; and ecological preservation and biodiversity. Public-lands law is substantially structured by centuries of statutes, adopted between 1785 and 1976, and the key to understanding a hard question today lies in the way the various statutes have integrated these goals into a single regime.

1. Public-Lands Law's Eras, Constituencies, and Ideologies

Public-lands law has developed through a series of distinct eras, each of which generated distinctive statutory regimes. Many of these regimes persist today in a kind of statutory palimpsest. Between 1785 and the last three decades of the nineteenth century, the overriding agenda of the field was privatization in service of economic (and political) development.[91] Statutes made public lands available for sale, as grants to railroad companies, and to individual settlers in return for homesteading, timbering, timber-planting, mining, draining wetlands, irrigating drylands, and, generally, domesticating the terrain and extracting commodities from it.[92] Although President Franklin Roosevelt closed most public lands to homesteading by executive order in 1934 and Congress in FLPMA repealed the remaining homesteading statutes and other regimes for disbursing federal acreage as real estate, mining, drilling, and timbering maintain a major presence for extractive privatization on the public

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preservation of the great sand dunes and additional features of scenic, scientific, and educational interest").

[91] *See* Paul W. Gates, History of Public Land Law Development (1968) (rich history of the political processes and interests at play in the disbursement of the U.S. public domain); James Willard Hurst, Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836-1915 (1964) (setting out in detail the extraction of wealth from public lands that powered nineteenth-century economic development).

[92] *See, e.g.*, General Mining Law of 1872, 30 U.S.C. sec. 22 (2006) ("[A]ll valuable mineral deposits in lands belonging to the United States… shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States….").

lands.[93] Grazing rights and motorized public access also persist as legal survivals from the period of development-oriented public-lands law.[94]

Beginning in 1872 with the congressional creation of Yosemite National Park, a second mode of public-lands law entered the field: permanent reservation of land under federal management to serve one or another version of public interest.[95] (Previous development statutes had provided for federal retention of land for post offices and military sites, but these were adjunct to development-oriented privatization, not alternatives to it.) The first statute regularizing such reservation was an 1891 provision authorizing presidential reservation of timberlands, later repealed under pressure of controversy but replaced by the Forest Service Organic Act of 1897.[96]

These permanent reservation statutes fell into two categories. *Conservation* statutes promoted the utilitarian management of resources that were thought to be vulnerable to wasteful private extraction. Federal management of timbering on the national forests remains the paradigm of a conservation regime. P*reservation* statutes removed land from the pressures of economic use in certain unique and irreplaceable locations. Acts creating national parks preserved land in the service of scenery and outdoor recreation. The Antiquities Act did the same in the service of "objects of historic and scientific interest."

Each of these strands or layers of public-lands law has distinctive constituencies. Extractive industries, their employees, and communities that identify culturally with them are core supporters of the regimes of privatization, often advocating significant expansion of extraction, sometimes proposing re-opening sale of public acreage as real estate.[97] (For the first, one need think only of 2008 Republican vice-presidential candidate Sarah Palin's "Drill, baby, drill!" or "Drill here, drill now!") Topical advocacy groups such as the Sierra Club and the Wilderness Society played key roles in preserving the lands devoted to their aesthetic and recreational values, and remain the organized core of a constituency for wild lands.[98] These constituencies are, of course, cross-cutting and dynamic. Environmentalists, although still sometimes criticized as unduly fixated on Hudson River School images of American terrain, frequently support preserving less obviously charismatic landscapes and dimensions of biodiversity, such as wetlands. Industries that stand to benefit from extractive

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[93] *See* Executive Order 6910, Withdrawal of Public Lands for Conservation (Nov. 26, 1934) (withdrawing lands from settlement in the Western states).

[94] *See* Taylor Grazing Act of 1934, 43 U.S.C. sec. 315 et seq. (governing grazing on public lands); Southern Utah Wilderness Alliance v. Bureau of Land Management, 425 F.3d 735 (10th Cir. 2005) (claims of public access arising under pre-FLPMA Revised Statute 2477 to be adjudicated by courts on common-law basis rather than initially decided by Bureau of Land Management and reviewed under administrative-law standards).

[95] *See* An Act to Establish a National Park Service, Pub. L. No. 64-238, 39 Stat. 535 (codified as amended at 16 U.S.C. sec. 1 (2006).

[96] *See* Sundry Civil Appropriations Act of 1897, 30 Stat. 35 (codified as amended at 16 U.S.C. sec. 551 (2006).

[97] *See* Philip Shabecoff, *Watt Announces Plan to Sell 5% of U.S. Lands*, N.Y. Times, June 15, 1982.

[98] *See* Jedediah Purdy, *The Politics of Nature*, 119 Yale L.J. 1122, 1145-73 (tracing certain of these developments) (2010).

privatization may prefer taking resources from public lands to holding the full liability of private ownership.[99]

Advocacy of competing agendas for public lands has always been tied up with competing ideas of who forms "the public" in the first place, ideas that have linked hierarchies among people together with normative ideas about the natural world--what its value is and how humans should fit into it.[100] The privatization agenda that formed the main body of the first century of public-lands law was deeply involved in the rationalization of the expropriation of indigenous lands and the expansion of Anglo-American claims on the continent. This rationalization, which was by turns theological, anthropological (specifically racist), and economic, turned on the ideas that the natural world was meant to be developed and that the proliferation of private ownership was the best way toward this goal.[101] It was central to the ideological scaffolding of "Manifest Destiny" in the self-description of a settler-colonial national project.[102] The move toward permanent retention of federal lands in new regimes such as national forests and parks was connected with the development of a strong national administrative state--and with the projection of that state abroad in imperial adventures that were defended as performing the humanitarian service of administratively rational development.[103] The Wilderness Society and the broader constituency for scenic wild lands and strenuous, low-tech recreation contended that the opportunity to escape from "civilization" is a key public resource that saves a developed society from becoming "a cage"--and elevated an elite, mainly white and male outdoors culture as the specially eligible spokespersons of the natural world and its meaning.[104]

2. The Normative Structure of Public-Lands Law

These compressed, abstract accounts of worldviews and constituencies are connected to the public lands in ways that are extensive and concrete. Public-lands law integrates these values through a system of statutes that are distinguished by their goals and governance regimes. Lands governed by the Forest Service and the Bureau of Land Management under the National Forest Management Act and FLPMA are, in the parlance of the field, multiple-use acreage, statutorily dedicated to diverse purposes that are frequently mutually incompatible on any one tract: "recreation, range, timber, minerals, watershed, wildlife and

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[99] *See, e.g.*, Philip O. Foss, Politics and Grass: The Administration of Grazing on the Public Domain (1960) (classic study of the public-choice dynamics of access to public lands) .

[100] *See, e.g.*, Jedediah Purdy, After Nature 31-45, 153-87 (on these themes).

[101] *See, e.g.*, Johnson v. M'Intosh, 21 U.S. 543 (1823) (endorsing subordination and eventual elimination of Native American land claims); Stuart Banner, How the Indians Lost Their Land: Law and Power on the Frontier, 10-48, 121-60 (2005) (on the early colonial acceptance that Native Americans should hold certain property claims and the erosion of this belief); Lisa Ford, Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788-1836 at 13-29, 183-203 (2010) (describing parallel growth of natural-rights claims to settlement in two settler colonies).

[102] *See, e.g.*, Purdy, After Nature at 70-95.

[103] *See id.* at 153-87 (tracing the connections among the conservationists' conception of the natural world and imperatives for its management, the need for a strong administrative state, and the projection of U.S. imperial power abroad in a recasting of Manifest Destiny).

[104] *See id.* at 180-87 (on the racism of key figures in early wilderness thought). The "cage" comment is from Senator Frank Church of Idaho. *See* 107 Cong. Rec. 18,365 (1961).

fish, and natural scenic, scientific and historical values."[105] These goals are not exhaustive, and they are not organized by reference to any master-value such as economic value.[106] These pluralist regimes require what is in effect ongoing landscape-scale zoning in national forests and on BLM land, with very considerable agency discretion. A typical management area in one of these land categories encompasses tens or hundreds of thousands of acres and is governed by a comprehensive plan, produced by the Forest Service or Bureau of Land Management in consultation with community members and interest groups and updated periodically. Such a plan might dedicate a valley or forest to wilderness preservation, hiking, and camping; open other parts of a region to motorized access and hunting; and provide for timber sales or mineral leases in selected areas (likely including the areas open to motorized recreation). The competing uses are not formally mutually exclusive - it is quite ordinary that an established hiking trail might pass through areas that are grazed and periodically logged, for instance; but mineral extraction tends to exclude much outdoor recreation, wilderness management precludes motorized activity and extraction, and wildlife and watershed values are in perennial tension with any other uses more intensive than wilderness.

The statutory regimes governing lands set aside as national parks (each one by an act of Congress) require much less pluralistic integration. The National Parks Service Organic Act of 1916 directs the agency "to conserve the scenery and the natural and historic objects and the wild life [sic] therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."[107] Most acts creating national parks simply hand them over to the parks regime: Glacier National Park (1910), for instance, is to be preserved in "a state of nature" with an eye to "the care and protection of the fish and game, " while Grand Canyon National Park (1919) is dedicated to "the benefit and enjoyment of the people" in keeping with the terms of the intervening Organic Act.[108] While parks administration involves complex and contentious issues of ecosystem management and conflicts between public access and preservation, these decisions operate within a far narrower range of potential uses than those governing multiple-use lands, and extractive uses are almost categorically off the table in parklands. A similarly focused set of purposes governs the National Wildlife Refuge system, much of it established by presidential withdrawal. Ecosystem management for habitat health and biodiversity is the touchstone of the system, which is chiefly managed by the National Fish and Wildlife Service, and permission for recreational and hunting access and right-of-ways is conditional on compatibility with these overriding goals.[109]

The most categorical of the public-lands statutes, the Wilderness Act dedicates about 110 million acres to "solitude" and "primitive and unconfined … recreation" by mandating

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[105] 43 U.S.C. sec. 1702(c) (FLPMA). *See also* National Forest Management Act (establishing "multiple use" goals of "in particular … outdoor recreation, range, timber, watershed, wildlife and fish"; 16 U.S.C. 528 (setting goals for national forest management of "outdoor recreation, range, timber, watershed, and wildlife and fish purposes" (Multiple Use-Sustained Yield Act of 1960).

[106] See 43 U.S.C. sec. 17002(c) (land planning shall proceed "not necessarily [with reference] to the combination of uses that will give the greatest economic return or the greatest unit output").

[107] 16 U.S.C. sec. 1 et seq.

[108] Act of May 11, 1910 (S. 2777, Public L. No. 171); Act of Feb. 26, 1919 (S. 390, Public L. No. 277).

[109] *See* 16 U.S.C. 668.

the preservation of its "wilderness character."[110] Wilderness areas are designated by separate acts of Congress and are protected from motorized access, road construction, and permanent structures.[111] While no single agency administers the federal wilderness system, and wilderness designations overlie prior designation as nation park or national forest, the Wilderness Act's categorical requirements impose a uniform management regime on all lands that it governs.[112]

One can say, then, that along this spectrum the hyper-categorical Wilderness Act all but administers itself (not literally true, of course, but it imposes little need for administrative agencies to balance interests or choose among values), while the multiple-use statutes demand pervasive, ongoing, and very basic judgments of value across the acreage managed by the Forest Service and the Bureau of Land Management. Between the two poles, national parks and wildlife refuges lean substantially toward the categorical end of the spectrum, permitting and pragmatically requiring a variety of management decisions, but organizing these around overriding and all-but-exclusive values of preservation and public recreation.

C. The Stakes and Structure of Reclassifying Public Lands

Reclassifying acreage among these categories is a high-stakes affair. It brings constituencies into the decision-making process or excludes them, gives their goals priority (sometimes absolute priority) or throws them into the scrum with competing interests. As noted earlier, the weight of these concerns is evident in Secretary Zinke's memorandum recommending shrinkage of Bears Ears and other monuments, and in President Trump's remarks upon issuing his monument proclamations. Both concentrated on the way that establishing a monument excludes certain extractive and, frequently, recreational interests from the land's governance procedures. Zinke expressly contrasted monument status with the multiple-use planning process typical of Bureau of Land Management governance, praising the latter for its inclusiveness and flexibility.[113] The effect of the revisions that he recommended, and which the President adopted, was to return hundreds of thousands of acres to multiple-use planning.

That decision, which can be parsed as expressing a simple statutory-interpretation judgment that the President's Antiquities Act discretion includes both creation and revision of monuments, shows its radicalism when placed within the field of public-lands law. Certain patterns have emerged that lend coherence to field's navigation of reclassifications, and the Trump proclamations defy them.

1. Intergenerational Synthesis

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[110] 16 U.S.C. 1332.

[111] *See id.* et seq.

[112] *See* 16 U.S.C sec. 1133(b)-(c) (governing use of wilderness areas across agencies); Wilderness Society v. U.S. Fish & Wildlife Service, 353 F.3d 151, *en banc* (9th Cir. 2003) (emphasizing the categorical requirements of the Wilderness Act, which override discretionary agency judgments, even those arguably consistent with "wilderness values").

[113] *See supra* n. __.

One pattern forms a scheme of intergenerational synthesis that integrates earlier and later public-lands regimes.[114] Setting land aside as indefinitely public (*withdrawal* when it is simply held as public, *reservation* when it is dedicated to a particular public purpose, such as a national forest or park) forecloses privatization prospectively.[115] But withdrawal and reservation are also limited retrospectively by previous privatization. Where privatization statutes have created inholdings and other conflicting claims, withdrawal and reservation statutes have directed land-management agencies to accommodate these or to address them by purchase or exchange. These principles developed under homesteading-style regimes that privatized acreage as real estate, and have continued into the modern era of extractive privatization. The multiple-use land regimes embrace extractive privatization in the form of timber sales and oil and gas leases, directing planning agencies to integrate these goals with recreation and ecological preservation. When land is reclassified and brought under the more categorical regimes, such as those governing parks and wilderness, the exclusion of new privatization extends to extractive leases: although these designations generally accommodate existing extractive claims, they also preclude new ones.[116]

Because the categorical reservation regimes thus entail exclusion of many uses and interests, reclassification into those regimes is particularly fraught and contested. Parks creation, wilderness designations, the assessment and maintenance of "wilderness study areas" (potential wilderness where FLPMA directs BLM to prevent degradation of "wilderness values" pending final designation or non-designation as wilderness), and monument proclamations all attract this intense political contestation. This is precisely the sort of ongoing political conflict that the Zinke memo and Trump proclamations take up as fuel for an extractivist, selectively localist, and racially inflected environmental politics.

2. Separation of Powers

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[114] Bruce Ackerman develops the idea of intergenerational synthesis among "moments" of constitutional lawmaking in 1 We the People: Foundations (characterizing, e.g., *Griswold v. Connecticut* as a the product of integrating the libertarian commitments of the Bill of Rights with the New Deal's empowerment of the social-administrative state), and William Eskridge and John Ferejohn treat the accumulated normative weight of statutes as "precedent" for the reorientation of fields of law to new purposes or balances among purposes in A Republic of Statutes: The New American Constitution (2010) 224-53 (on changing models of family and interpersonal commitment). In using the term, I don't mean to take on any highly specified account of legal change, authority, or interpretation, but to indicate that my account of public-lands law has affinities with these ways of achieving coherence across time and among multiple sources of law. While my account is less theorized, it is also more specific. The structured priorities among the eras, and their expression in separation of powers with respect to reclassification, make my account more determinate in its interpretive recommendations than their far-reaching hermeneutics.

[115] *See, e.g.*, Wilderness Act of 1964, 16 U.S.C. sec. 1131 *et seq.* (withdrawing wilderness area from eligibility for extractive claims, subject to vested prior claims, and with partial, time-limited exception for mining claims); Act of March 1, 1872 (establishing Yellowstone National Park and "withdraw[ing] from settlement, occupancy, or sale" all of the designated acreage); 16 U.S.C. sec. 161 *et seq.* (establishing Glacier National Park, honoring established property rights under land laws, withdrawing park from subsequent claims, and establishing a system of exchanges of timber or other public lands for existing rights to consolidate park lands).

[116] *See, e.g.*, sources in previous note, *supra*.

The Trump proclamations are even more remarkable in light of the separation-of-powers practice that forms the second pattern structuring public-lands law's integration of competing purposes. Although the President over the twentieth century enjoyed a variety of pre-FLPMA powers to move multiple-use lands in and out of availability for one purpose of another, such as mineral leasing, stock-watering, and irrigation, and to sequester land for national-security purposes, Congress has never authorized the President to remove land unilaterally from a categorical regime and open it to extractive use under multiple-use management. The reason is not elusive: the categorical regimes serve preservationist goals, protecting historic, ecological, scenic, and recreational (wilderness) values that are marked by their vulnerability to substantially irreversible disruption. It takes only one row of derricks or copper-mining pit to spoil a Yosemite Valley, one road to destroy a wilderness area (in terms of both the aesthetic-cultural meaning of wilderness and the statutory requirements of the Wilderness Act), one ill-informed or opportunistic digging expedition to wreck an archaeological site. Opening such a site to extraction risks losing the option of preserving other values there.

For these reasons, public-lands law has long been structured to avert precipitate executive privatization, especially of lands set aside categorically for preservationist purposes. Such privatization, whether in the traditional homesteading form or, more recently, through timber sales and mineral leases, is the likeliest way for reclassification to destroy vulnerable values and preclude later implementation of management regimes aimed at those. Where Congress has brought lands into a categorical regime, such as under the national parks or wilderness system, the President has no power to change that status. Even where the President has enjoyed implicit power to reclassify public lands, such as the Supreme Court found in *Midwest Oil*, this power has asymmetrically favored preservation over privatization.

The Federal Land Policy and Management Act of 1976 (FLPMA), which I discuss later in connection with its reassertion of the primacy of Congress in classifying public lands, also contains a major and paradigmatic example of the conjunction I am describing: the one-way ratchet of Presidential reclassification power, authorizing movement of lands into categorical and preservation-oriented regimes, but not out of those regimes into multiple-use classifications. FLPMA extends the potential for wilderness classification to Bureau of Land Management acreage, which had been omitted from the 1964 Wilderness Act. FLPMA directs the Interior Department to inventory BLM lands with "wilderness characteristics" and the President to convey to Congress a recommendation as to which of those lands should be permanently designated as wilderness.[117] Once a tract has been identified by Interior as potential wilderness (whether or not the President recommends permanent designation), FLPMA directs BLM to manage it "so as not to impair the suitability … for preservation as wilderness, subject, however, to the continuation of existing mining uses and mineral leasing in the manner and degree in which the same was being conducted [at the time of FLPMA's passage]."[118] This management directive continues until Congress decides whether to designate the land permanently as wilderness or to release it into the general pool of multiple-

[117] *See* 43 U.S.C. sec. 1782(a).
[118] 43 U.S.C. sec. 1782(c).

use BLM lands.[119] In sum, Executive classification of the land as potential wilderness moves it into that category, subject to the core intergenerational-synthesis principle of honoring existing rights from prior privatization regimes. The Executive, however, has no power to move the same land back into multiple-use, and so into eligibility for new extractive and privatizing claims; only Congress can do that.

3. The Antiquities Act in the Public-Lands Setting

This distinction helps to make sense of the textual differences between the Antiquities Act, which does not grant the President express power to revoke or revise monument classifications, and the Forest Service Organic Act, which did grant that power for national-forest reservations. For pro-Trump arguments favoring the power to revoke monuments to succeed, the difference between the Antiquities Act (making no reference to revocation) and the Forest Service Organic Act (granting an explicit power of revocation) must be immaterial to the statutes' actual grant of power, with the Organic Act otiosely stating the obvious. There is, however, a difference between the statutes that accounts perfectly for the difference in drafting. Appreciating it means descending from the general theory of default powers to the more specific setting of public-land law at the turn of the twentieth century. National forests have always been designated for multiple-use management, and the decision to move them back into the default regime of public lands would not essentially change this status, as moving categorically designated lands into multiple-use management would do. The Organic Act is the paradigm of a *conservation* statute, one assigning the management of a class of resources to an expert-staffed government agency charged with administering it to serve the long-run interest of the public.[120] It was passed in response to worry about exhaustion of economically essential resources, and presupposed that the executive branch would use a variety of techniques to balance timbering, long-term forest productivity, and management of watersheds that were dependent on headwaters forests for erosion and flood control and yearlong flows.[121] The point was to allow private extractive activity on the public lands, under appropriate regulation. Executive discretion, appropriately informed by expertise and utilitarian purposes, was the core governance technique of the statute, replacing a regime of private "entry" onto timber lands that had produced wasteful, even disastrous over-harvesting.[122]

The Antiquities Act, by contrast, was a *preservation* statute. Its purpose was to protect certain resources from extraction or other transformation by removing them categorically

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[119] *See id.*

[120] *See* Sundry Civil Appropriations Act of 1897, 30 Stat. 35 (codified as amended at 16 U.S.C. sec. 551 (2006). ("Public forest reservations are established to protect and improve the forests for the purpose of securing a permanent supply of timber for the people and insuring conditions favorable to continuous water flow."); Jedediah Purdy, *American Natures: The Shape of Conflict in Environmental Law*, 36 Harv. Envtl. L. Rev. 189-99 (2012) (discussion conservation statutes).

[121] *See* 21 Cong. Rec. 2537 (1890) (entering into the record a memorial from the American Forestry Association, urging adoption of interconnected regime for managing forests and watersheds); Dep't of the Interior, Report of the Secretary of the Interior 14 (1891) (urging use of President's timber-conservation power to conserve both forests and watersheds).

[122] *See, e.g.*, Paul W. Gates, History of Public Land Law Development (1968); James Willard Hurst, Law and Economic Development, *supra* n.__.

from the public lands laws' schemes of sale and privatization. The reason for this approach lay in the character of the objects that the Antiquities Act protected: they were valuable for their unique and irreplaceable qualities, rather than for their fungible and instrumental uses. The Antiquities Act of 1906 combined language from two earlier legislative proposals that had failed between 1900 and 1905. One comprised bills drafted and promoted by the American Association for the Advancement of Science and the Smithsonian Institution, respectively, which sought to preserve Native American relics, which had been devastated by development in the Midwest and, most saliently, were then being actively looted in the Southwest by settlers, tourists, and freelance scientific expeditions, some of the largest of which removed the artifacts (and human remains) from the country to stock European collections.[123] The second legislative proposal, which came from the General Land Office in the Department of the Interior, would have authorized the President to create national parks to preserve "scenic beauty, natural wonders or curiosities [and] objects of scientific or historic interest."[124] In extending its scope to "historic landmarks, historic and prehistoric structures" and "objects of historic or scientific interest," the Antiquities Act adopted both strands of the preservationist program.[125]

It is entirely consistent with the patterns of public-lands law that the Antiquities Act withheld the same revocation power that the Forest Service Act granted because of the distinct purposes and instruments of the two statutes. For the national forests, presidential reservation was delegated as a tool in a flexible scheme aimed at increasing the long-term benefit of a fungible resource by publicly managing the timing and terms of private extraction. For the national monuments, reservation served to put unique and irreplaceable objects outside the scheme of extraction and privatization.

If courts now found that the Antiquities Act authorized the President unilaterally to reclassify monument lands, they would have identified (or created) an anomalous power that cuts against the patterned logic of the rest of the public-lands regime, authorizing the President to un-make national monuments as he may not national parks or wilderness areas. The silence of the Antiquities Act on presidential power to revise or revoke monuments is not simply a standard case of Congress's having known how to grant a power and declining, through silence, to do so; it is a case of Congress's having acted consistently with a well-justified and consistent pattern of not authorizing unilateral presidential de-classifications of categorically protected lands.

4. The Antiquities Act and Public-lands Populism

The pattern of powers in public-lands law generally casts light on the legal significance of public-lands populism. The movement that President Trump has embraced is engaged in an effort to recast the priorities of public-lands law, reviving an emphasis on extraction and privatization and increasing local control of (or devolving) federal acreage. Although this effort is rooted in a rejection of the authoritative account of the Property clause in favor of a constitution-in-exile view that last had much traction before the Civil War, it also implies

[123] *See* Ronald F. Lee, The Antiquities Act of 1906 29-38, 47-51 (1970).
[124] *Id.* at 52-53.
[125] *Supra* n.__.

rejection of more proximate legal arrangements: substantively, the existing classifications of public lands, and, procedurally, the division between Congress and the President in the power to reclassify lands in favor of extractive privatization. As long as Congressional veto-gates and time constraints impede legislative reclassification, the hydraulic movement of pressure for reclassification to the President is predictable. The attraction for an autocratic President with an ear for hot-button and racially inflected cultural disputes is obvious.

This point deepens and textures the reasons courts should not rule that the Antiquities Act confers an anomalous Presidential power to revise or revoke monument status.[126] The substance and procedure of public-lands law as now constituted represents a compromise among competing visions of the public lands and their users, in which extraction, privatization, and other kinds of populist access have been well represented. To the extent that one can separate extractive and other populist interests from their uglier valences, they are legitimate contenders for the use of public lands; but they are contenders whose loss and checking on key points is enshrined in the compromise that public-lands law composes. There is no reason to authorize this Administration to rewrite that compromise by doing what Presidents cannot otherwise do. It is possible, and straightforwardly appropriate, to neutralize this political gambit of public-lands populism by reading the Antiquities Act in consistency with both its text and the larger structure of public-lands law.

IV. THE ANTI-CORRUPTION GOALS OF PUBLIC-LANDS LAW

The asymmetric presumption against presidential privatization is partly rooted in the terms in which I have been discussing it: as a feature of the integration management regimes tailored to competing and often incompatible purposes. It is also rooted in concerns about corruption, both historically and in ways that the current Administration's conduct makes salient. The concern with corruption had particular weight in eras when public-lands law was essentially a wealth-disbursement regime that created private property out of the public domain. Favoritism and other forms of corruption were concerns of obvious salience in a disbursement regime, but somewhat receded as twentieth-century public-land law eliminated traditional real-estate-conferring privatization and consolidated its hierarchy of management regimes. For some reasons that are specific to the minerals-releasing opportunism of the Trump monument proclamations and others that are general to the Trump Administration's blend of public and private power in influence-peddling and favor-giving, the corruption

[126] One might object that there is also anomaly in the Antiquities Act's authorization of unilateral preservation, especially of landscape-scale monuments. I don't deny that. The Act is interesting and politically controversial because it lodges an unusual power in the President. It is certainly convenient to environmentalists, among whom I tend to count myself, if the Act delegates an anomalous one-way reclassification power, rather than an anomalous reversible power. But two major points weigh against this objection. First, as I argue throughout this paper, the power to preserve and the power to privatize are not symmetric in public-lands law. A unilateral power of privatization would be anomalous in a different degree than the President's Antiquities Act power of preservation, and would cut against organizing patterns and principles in the field. Second, the fact that the President's preservative power under the Antiquities Act has the broad scope that the Supreme Court has recognized in *Cameron* and *Cappaert* is a given legal baseline for the purposes of this analysis. I am not seeking a first-principles account of public-lands law, but engaging the legally open question now before the courts, whether the President's power to proclaim monuments is reversible, in light of the normative patterns of the field.

rubric is once again salient, and the anti-corruption rationale for the presumption against presidential privatization is worth recovering.

Corruption has gained fresh prominence in jurisprudence and legal scholarship in the past decade. The Supreme Court thrust it to the center of First Amendment law by holding in 2010 that only preventing "corruption or the appearance of corruption" could justify restrictions on campaign spending (and that "quid pro quo" transactions are the only sort of political influence-peddling that qualifies as corruption).[127] Some scholars argued in response that the Court's individualist, person-to-person conception of corruption should be complemented by a structural conception emphasizing institutional patterns of access and influence.[128] Suits against President Trump under the long-dormant Emoluments Clause recently sparked another fire.[129] It is too early to say confidently whether Emoluments Clause litigation will prove more than a kind of courtroom theater to highlight the current administration's flouting of norms around the mixing of public and private influence, business, and wealth.[130] Whatever its outcome, the emoluments dispute highlights a critical issue in legal design: restriction on Executive discretion, and specifically on Presidential discretion, can serve as a structural anti-corruption device by removing the instruments of favoritism and self-dealing. This principle has direct application to the interpretation of the Antiquities Act.

The Antiquities Act's asymmetric grant of presidential power to confer protection but not to remove it makes perfect sense when withholding of the removal power is recognized as being, in part, a structural prophylaxis against corrupt executive action. While the simplest reason not to give the President removal power is that he does not need it to accomplish the Act's purpose of preservation, this is buttressed by the danger of misusing the power to undercut the preservation goal.

Several interlocking considerations support this interpretation. First, in 1906 reformers had agitated for decades against opportunistic privatization of public and land and its resources, focusing on executive-branch officials' complicity in privatization that, while often not technically illegal, amounted to wealth-grabs from the public domain. Second, the Antiquities Act itself was intended to prevent opportunistic privatization in the form of expropriation of artifacts or destruction by development of irreplaceable sites. Third, landmark interpretations of presidential power over the public lands, including the major twentieth-century Attorney General's account of the Antiquities Act, have recognized the

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[127] *See* Citizens United v. FEC, 558 U.S. 310 (2010).

[128] *See*, Zephyr Teachout, Corruption in America (2014); [Lessig; cf. Post] Others, more sympathetic to the Court's situation if not always to its conclusion, insisted on the difficulty of devising a standard of structural corruption that could approximate judicial neutrality toward partisan and other electoral conflicts. Deborah Hellman, Post, Tribe.

[129] *See* David A. Fahrenthold & Jonathan O'Connell, *Federal Judge Appears Receptive to Emoluments Lawsuit Against Trump*, Wash. Post, Jan. 25, 2018 (describing suit by District of Columbia and Maryland); cf. Josh Gerstein, *Judge Dismisses Suits Claiming Trump Violated Emoluments Clause*, Politico, Dec. 21, 2017 (describing dismissal on standing grounds of an earlier suit).

[130] *See*, *e.g.*, Steven Levitsky & Daniel Ziblatt, How Democracies Die (2018) (detailing Trump Administration's norms violations around corruption and other topics).

following asymmetry: The presidential power to protect land in order avert destructive or opportunistic privatization *does not* imply presidential discretion to privatize public resources. Taken together, these considerations support an interpretation of the Antiquities Act as in part a structural anti-corruption device, designed to protect irreplaceable public resources by enabling the President to prevent their privatization, but not to privatize them himself. These considerations are particularly relevant in considering unprecedented monument revisions by a President whose private economic interests and loyalties are entangled with public power in ways that are historically unique in their opacity and ethical dubiousness.[131]

A. The Concern with Corruption in Public-Lands Law

Public-lands corruption was a point of fixation for public debate in much of the nineteenth and early twentieth centuries, and was particularly salient when the Antiquities Act was debated and passed. The federal privatization of North American land, timber, and minerals is one of the great disbursements of wealth in world history, and it is hardly surprising that it prompted fierce conflict over the question who should get the resources and the various forms of legerdemain that grew up around every privatization scheme. To give a sense of the scale of the matter: an 1886 House report found that fraudulent claims and illegal fencing of Western grazing lands had brought more than 21 million acres under the control of British and European cattle capital, including 1.75 million acres in the hands of the memorably titled Marquis of Tweeddale.[132] A reformist commissioner of the General Land Office (GLO) reported in the mid-1880s that some forty percent of homesteading claims were fraudulent but tolerated by the office; "conspicuously fraudulent" claims under the Timber Culture Act had been protected by official rulings of his predecessors; and false claims and open looting of public timber were "universal, flagrant, and limitless."[133] The conflict was not chiefly between privatizing claimants and federal regulators, though congressional critics of the reformist administrators often painted it in these populist terms.[134] It was, rather, a matter of the General Land Office's tolerating or collaborating with large extractive investors' manipulation of privatization statutes. So the reformist GLO of the 1880s returned tens of millions of acres to eligibility for "entry" under statutes governing homesteading and other small-scale settlement after determining that railroads had locked them up by abusing the vast grants that were meant to finance their westward expansion.[135] The GLO's commissioner emphasized that Executive-branch discretion had been the key to

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[131] [Pro Publica & others]

[132] *See* House Reports, 49t Cong., 1st sess. (Serial No. 2445), vol. XI, 3455, p. 2. *Cf.* Paul W. Gates, History of Public Land Law Development 483, n. 58 (1968) (suggesting the report was somewhat sensationalistic but pointed to a real phenomenon; even an exaggerated documentation highlights the intensity of political sentiment around the issue).

[133] *See* Gates, *supra* n. __ at 459 (summarizing report of General Land Office Commissioner William A.J. Sparks).

[134] [citation]

[135] *See* Gates at 460. As Gates notes, the open class-and-faction battles over railroad grants included incidents such as the following in 1860s Kansas: "raids on the railroad offices, destruction of all the equipment of surveying parties, public whipping of the officers … burning of ties, and the gutting of the office of a newspaper subsidized by the railroad. Two men who bought land from the railroad were murdered, a sheriff was arrested and convicted of insanity for aiding the railroad, and defenders of the railroad were stoned and burned in effigy.

a use of the office's power "to the advantage of speculation and monopoly, private and corporate rather than the public interest."[136]

The same issues remained highly salient during Theodore Roosevelt's presidency, when the Antiquities Act became law. Roosevelt remarked in his 1902 State of the Union address on the widespread abuse of public-lands laws, and appointed an investigatory commission that found the great majority of land claims in regions rich in timber or minerals were made by catspaws with no intention of using them, then transferred to speculators or extractive interests.[137] Roosevelt warned that "ample notice has now been given to the trespassers, and all the resources that the command of the Government wlll hereafter be used to put a stop to such trespassing."[138]

Reformers were keenly focused in these decades on corruption in the disbursement of public lands and what measures might prevent it.[139] In its 1905 report, the Public Lands Commission described extensive opportunistic privatization. Under the Timber and Stone Act, "many of these [claims] were made by nonresidents … who could not use the land nor the timber on it … and it is apparent that they will eventually follow the course taken by many similar entries and become part of some large timber holding."[140] The commission found that a privatization-for-hire system had developed: "poor men" filed lands claims, which they transferred to timber companies, receiving only hourly wages for the time spent on paperwork, resulting in "the sale of the lands far below their real value.[141] Thus, "timber lands which should have been preserved for the use of the people are withdrawn from such use" in favor of corporate profit-taking.[142] The commission found that the Homestead Act had been "perverted" by a similar claims-for-hire system in which ostensible settlers (often women or, in the Northern Rockies and Pacific Northwest, transient Canadians) flipped their claims to speculators.[143] Similar transfers were frequent under the Desert-Land Law.[144] In sum, the public-land laws had become vehicles for "the shrewd business man who aims to acquire large properties," and the majority of privatization served "speculators and corporations."[145]

Executive-branch corruption was integral to the commission's account of the problem. The Public Lands Commission Report concluded, "Almost without exception collusion or evasion of the spirit of the land laws was involved" in the privatization it criticized.[146] For

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[136] Gates at 471 (quoting General Land Office Commissioner Sparks). Sparks wrote of GLO officers, "if they do not corruptly connive at fraudulent entries, [they nonetheless do] modify their instructions and exceed their discretionary powers in examinations of final proof." Land Office Report of 1885 at 50.
[137] *See* Gates at 487-92; Roosevelt, Annual Report to Congress (1902).
[138] Roosevelt, Annual Report, *supra* n. __.
[139] Elting E. Morison, 4 The Letters of Theodore Roosevelt 1217-18 (1951).
[140] Use and Abuse of America's Natural Resources: Report of the Public Lands Commission at vi, 58th Cong. (3d Sess.), Doc. No. 189(1905).
[141] *Id*. at xvi.
[142] *Id.* at xvi - xvii.
[143] *Id.* at xvii - xviii.
[144] *Id.* at xviii-xx].
[145] *Id.* at xxiii.
[146] *Id.* at xxiv.

example, abuses of the Homestead Act were frequently facilitated by federal land officials who doubled as principals in loan companies, who lent the capital to ease each stage of the claims-and-transfers system that they oversaw, "eager first to induce settlement and then to make these loans on account of the double commissions received."[147] The commission's recommendations were chiefly structural changes to public-lands laws to inhibit these opportunistic transactions by restricting hasty transfers of claimed land and blocking the extension of the Homestead Act to mountainous regions rich in timber, stone, and minerals, but with little prospect for genuine 160-acre farming settlements in the Midwestern mold.[148]

B. The Anti-Looting Motives of the Antiquities Act's Adoption

It was in this reformist ferment around the public-lands laws that the Antiquities Act was adopted. The problem to which the Act responded was an aspect of a general and long-running crisis that was then regarded as having entered an acute phase: the looting of the public lands by various forms of corrupt or opportunistic privatization. The 1904 Senate Committee hearings on a predecessor bill focused on a legacy that was "being obliterated every day" by "commercial speculators and excavators."[149] Artifacts were leaving the West in "carloads" every day during the seasons that permitted excavation.[150] Some of the losses were due to commercial "[v]andals," others to archaeological expeditions launched by European institutions, which had exported "hundreds of car loads of objects which should have been preserved, as far as possible, in the condition in which they are found, or at least have been retained in this country."[151] With the general public lands open to anyone to enter and remove artifacts as they saw fit, the law effectively invited these forms of commercial looting and willy-nilly export.

The country's scientific community was mobilized around a perceived crisis of historical looting. Both the Smithsonian Institution and the American Archaeological Association were closely involved in advocacy and legislative drafting to meet the emergency, which they aptly expected to intensify as excavators hurried their efforts in anticipation of regulation.[152] There was little comfort in the thought that artifacts might end up in the hands of museums and collectors, because their greatest value as public goods was as a source of knowledge about pre-history, which required their systematic study in their original location.[153]

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[147] *Id.* at xviii.

[148] *See id.*, passim.

[149] Preservation of Historic and Prehistoric Ruins, Etc., Hearing Before the Subcommittee of the Committee on Public Lands, April. 28, 1904, at 5.

[150] *Id.* at 5.

[151] *Id.* at 18.

[152] *See* generally, Lee, supra n. __; Preservation, supra n. __ (containing extensive congressional testimony by Francis W. Kelsey, secretary of the Archaeological Institute of America, and statements from a clutch of university presidents, all in favor of legislation on scholarly grounds).

[153] *See* T. Mitchell Pruden, The Prehistoric Ruins of the San Juan Watershed in Utah, Arizona, Colorado, and New Mexico, American Anthropologist, N.S., V (1903), 237, 238 ("to gather or exhume specimens -- even though these be destined to grace a World's Fair or a noted museum--without at the same time carefully, systematically, and completely studying the ruins from which they are derived … is to risk the permanent loss of much valuable data and to sacrifice science for the sake of plunder").

The Antiquities Act is part of a family of reforms intended to secure the public interest in federal lands by raising barriers to opportunistic and corrupt privatization that undercut that interest. Understanding its origin and purpose casts light on the way the presidential public-lands power it creates has been interpreted in the past: as an asymmetric power to preserve public lands and their resources from certain kinds of privatization, but not to reclassify those lands so as to make them newly available for privatization. The asymmetry is a structural measure to prevent the forms of executive "collusion" with rent-seekers that privatization statutes had long invited.

C. Anti-Corruption in Prior Interpretation

1. The Attorney Generals' Opinions as Anti-Corruption Reasoning

Concern over corruption and opportunistic privatization was ambient among reformers and provided the major motive for the Antiquities Act. This would have been the self-evident theme of any initiative to reserve public lands from privatization during this period, even had the motive not been explicit in advocacy for the Antiquities Act. The same concern emerged as an important feature of the interpretation of the Executive power to reclassify public lands. The concern to check corruption structurally found expression in a persistent asymmetry, in authoritative discussions of the President's public-lands power, between the use of presidential power to preserve public lands, and uses of presidential power to tailor or expand privatization and extraction.

In 1938, President Franklin Roosevelt asked Attorney General Homer Cummings to assess a proposal to abolish a small national monument altogether. Cummings concluded that the President lacked the power to do so.[154] Cummings assumed the legality of the earlier presidential reductions in monument size, describing them as implementing the Act's requirement that monuments be "confined to the smallest area compatible" with protecting their objects.[155] In denying that the President may outright de-classify a monument, he contrasted the Antiquities Act with the Forest Service Organic Act of 1897, which (as noted earlier) "expressly provides that the President at any time may modify any Executive order establishing any forest reserve by reducing its area or by vacating it altogether."[156] In Cummings's reasoning, the absence of an express congressional grant of revocation power in the President implied that Congress had granted the President only a one-way power of classification: Once the President had classified a site as a monument, "the power conferred by the act was exhausted."[157]

In that last phrase, Cummings quoted his predecessor Edward Bates, who had written a Civil War-era Attorney General's opinion finding that President Lincoln lacked power to make available for privatization a site reserved under statute by earlier presidential action. In his opinion, Bates argued that presidential power to reserve federal land should be

[154] *See* Proposed Abolishment of Castle Pinckney National Monument, 39 U.S. Op. Atty. Gen. 185 (1938).
[155] *Id*. at 188.
[156] *Id.*; [cite Forest Service Organic Act]. Cummings also distinguished the General Withdrawal Act, which authorized temporary presidential withdrawals, reversible by executive action.
[157] 39 Op. Atty. Gen. at 187 (quoting Rock Island Military Reservation, 10 Op. Atty. Gen. 359 (1862)).

interpreted as one-way rather than reversible to prevent corruption.[158] Bates's opinion addressed the question whether the Secretary of War could release an unused fort to the Treasury Department for disposal under federal preemption law (a species of nineteenth-century federal land-privatization that gave priority to the claims of settlers in actual possession of public land by enabling them to "preempt" other claims), where the fort had been established by presidential proclamation under congressional authorization.[159] Elaborating on his already-quoted conclusion that the President's "power … was exhausted" upon reserving the land, and did not extend to revoking the reservation, Bates argued that discretionary revocation would invite executive branch officials to "enrich some speculating favorite" who could qualify to claim the land as a settler.[160] In other words, once lands had been removed from privatization schemes, the danger of their being selectively re-classified to favor the patrons or proteges of the executive branch provided a strong reason not to read Congressional delegation as authorizing such re-classification.

This concern would apply with special force to lands that had been developed at federal expense, as the fort at Rock Island had been. It would also apply with special force to land that had been reserved because of its unique and irreplaceable qualities. Either would be susceptible to ill-motivated discretionary privatization, and in both cases the loss from such corruption would be particularly high. There is, then, a snug fit between the basis of the drafting difference between the Antiquities Act and the Forest Service Act and the reasoning behind the Executive Branch's long-running opinion that national monument declarations are irrevocable.

2 *Midwest Oil* as an Anti-Corruption Opinion

United States v. Midwest Oil is the Supreme Court's most important treatment of Presidential power over public lands.[161] In the course of affirming implied executive power to reclassify federal land, it notes the asymmetric presumption against privatization and ties it to anti-corruption concerns.

In September of 1909, the Director of the U.S. Geological Survey reported to the Secretary of the Interior that, amid a crowded oil rush, California's oil lands would soon be fully privatized under the Oil Placer Act of 1897.[162] The Director expressed concern that the privatization of oil lands would leave the Navy "obliged to repurchase the very oil" the federal government was then disbursing.[163] On the Secretary's recommendation, and in anticipation of Congressional legislation, President Taft then issued a proclamation of "temporary withdrawal," removing more than three million acres in California and Wyoming from eligibility for Placer Act claims.[164] Oil operators who filed claim thereafter on a portion of the affected lands then sued the United States, asserting that Taft lacked power to withdraw the lands without explicit Congressional authorization and in the teeth of

[158] *See* Rock Island Military Reservation, 10 U.S. Op. Atty. Gen. 359 (1862).
[159] See id. at 363-67.
[160] *Id.* at 366.
[161] United States v. Midwest Oil, 236 U.S. 459 (1915).
[162] *See id.*
[163] *Id*.
[164] *See id.*

an extant statute giving private parties the right to claim oil lands. The Court held that the President had the power to withdraw the lands from oil claims.[165] The power might not inhere in the office "as an original question," but a long practice of Congress's accepting Presidential withdrawal for bird reserves, military reservations, and ancillary support of the latter (such as hay, water, timber, and target ranges) implied that the President could withdraw lands "as agent" of Congress and acting "in the public interest."[166]

After marshaling instances of unchallenged presidential withdrawal, Justice Lamar turned to make clear that, "These decisions do not, of course, mean that private rights could be created by an officer withdrawing for a railroad more than had been authorized by Congress in the land grant act."[167] The distinction here is between withdrawing land for purposes of preserving it and, on the other hand, withdrawing it to create private rights. The latter class of action is effectively irreversible. It forecloses Congress's future options in exercising its ultimate power over public lands. It is also especially susceptible to corruption, as it offers the President the opportunity to disburse economic assets from the public lands to favored industries and entities. Both concerns apply to reclassification of monuments that opens them to mining, drilling, and logging. Both, moreover, distinguish such reclassification from the initial monument proclamation, which preserves the resources in public hands for any future contravening (or confirmatory) congressional decision and does not create any private economic claim on the land.

D. The Asymmetric Premise Against Presidential Privatization

Anti-corruption concerns, then, form a second and complementary basis of the asymmetric premise against Presidential privatization. Reclassifying protected lands as eligible for privatizing extraction presents a set of interlocking dangers. Given the nature of the values generally protected in categorically preserved land, such as historic and scientific interest and ecological health, extraction may irremediably compromise those values, effectively denying Congress the option to preserve them in the future. Given the structure of intergenerational synthesis in public-lands law, creating private claims also burdens subsequent Congressional decisions to preserve lands even where it does not substantively undercut eligibility for preservation. Before 1934, when homesteading effectively ended, and 1976, when Congress repealed the last of the homesteading statutes, privatization of the land itself was the primary concern of this form. Today, the concern is not that the Executive will literally sell land out from under Congress, but rather that private rights to mining, oil leasing, and other extraction, once issued, will burden subsequent management options.

These by-now familiar reasons for the presumption against privatization find reinforcement in the threat of corruption: the Executive's capacity to act quickly and decisively, the basis of many functionalist assertions of Presidential powers, has the downside risk that a subordinate official--or the President--may opportunistically disburse private rights in public lands. Both Executive interpretation of Congressional delegations of power (including the Antiquities Act itself) and the Court's interpretation of the President's implied power have taken account of this danger through the structural anti-corruption

[165] *See id.*
[166] *See id.*
[167] 236 U.S. at 472-73.

device of a presumption in favor of a one-way Presidential power of reclassification, toward greater protection, but not toward greater eligibility for private claims. The same reasons support a conclusion that the President's power of proclamation under the Antiquities Act is a power to protect but not a power to remove protection. The prospect of mines and derricks in the former Bears Ears and Grand Staircase lands is a reminder of the reason for the presumption.

V. MONUMENT REVISIONS AND THE ERAS OF PUBLIC-LANDS POWERS

What, then, to make of the presidential revisions of monument proclamations in the first fifty years of the Antiquities Act's operation? To see these clearly, one must set them in the context of the withdrawal and reservation powers' migration between Congress and the President over the twentieth century. The Antiquities Act has operated against a changing backdrop of inter-branch allocation of power over the public lands, and this backdrop is highly relevant to interpreting the significance of historical congressional and executive-branch practice. While the allocation of power has always recognized the presumption against Presidential privatization, the early revisions took place against a background of expansive claims of Presidential power to reclassify federal land. That claimed power accounts for the plausibility of the early revisions in their times. It is, however, no longer part of public-lands law, having been repealed in FLPMA's sweeping 1976 consolidation of reclassification power in Congress. Presidents in the early days of the Antiquities Act had reason to think they could reclassify monuments in most such cases regardless of whether the Act delegated that power. That is very different from the question since 1976, which homes in entirely on the Act's delegation, and its consistency with the presumption against Presidential privatization.

A. Early Presidential Revisions

Early presidential monument revisions were mostly boundary adjustments, modest in absolute acreage terms (although they sometimes represented a substantial percentage of small, site-specific monuments). In some cases, the revisions made corrections to initial proclamations that had relied on hastily gathered or incomplete information about the character of the protected objects and their setting in the surrounding site.[168] In other cases, revisions accommodated pre-existing private land claims that fell within or were impeded by the monument.[169] Such accommodation is characteristic of all federal land-reservations schemes; even the sweepingly anti-development Wilderness Act acknowledges existing property rights.[170] Federal land agencies are typically authorized to seek acreage-swaps with private or state-government landholders to consolidated preserved federal land without

[168] *See*, *e.g.* Presidential Proclamation No. 873, 36 Stat. 2491 (1909) (Proclamation of President Taft, initially setting aside Navajo National Monument); Presidential Proclamation No. 1186, 37 Stat. 1733 (1912) (revising boundaries of same); Presidential Proclamation No. 2681, 11 Fed. Reg. 2623 (1946) (Proclamation of President Truman, reducing size of monument by more than 1,800 acres of an initial 46,034 because of errors in initial survey).

[169] *See*, *e.g.*, 37 Stat. 1737 (1912) (Taft) & 45 Stat. 2984 (1929) (Coolidge) (each modifying Mount Olympus National Monument to exclude a preexisting homestead); Exec. Order 3897 (Sept. 5, 1923) (excluding land from the Katmai National Monument to accommodate a prior mining claim).

[170] *See* notes __ *infra* and accompanying text.

eliminating vested existing rights. Many early revisions simply carried out this policy. A handful of revisions facilitated road-building in the monument or its vicinity, a management measure consistent with then-current practices in managing national parks and other lands preserved for scenery and recreation. None of these revisions displaced the basic judgments of earlier presidential proclamations as to the purpose or scale of preservation.

Several of the most substantial presidential monument revisions pursued national security interests in wartime - either formally declared or openly anticipated after major attacks on U.S. assets. In 1915, Woodrow Wilson removed 311,280 acres from Mount Olympus National Monument, transferring them to the Olympic National Forest.[171] The order came on May 11, four days after a German submarine sank the British ocean liner Lusitania, killing near 1,200 people, including 128 Americans. As John Ruple has noted in a survey of early presidential revisions, the Olympic Peninsula was a key U.S. source of Douglas fir for ships and Sitka spruce for airplanes, and the U.S. soon dispatched the "Spruce Production Division" of the Army to the Olympic National Forest to contribute to timbering and build railroads for shipping trees to sawmills.[172] In March of 1945, President Truman removed 4,700 acres from the Santa Rosa National Monument in Florida to expand an airfield that had become an important training and testing site for the Army Air Force.[173] President Eisenhower's 1951 reduction of Glacier Bay National Monument acknowledged a secret, presidentially authorized airfield that had been built within the monument during World War Two.[174] As I'll explain in more detail later, these reductions need not have rested on an Antiquities Act delegation of power to shrink monuments. They might well be seen as exercising an implied presidential power to reclassify lands for national-security purposes, which the Supreme Court recognized in 1915's *United States v. Midwest Oil*, and which Congress explicitly eliminated when it passed FLPMA in 1976.[175]

The most substantial monument revision to fall outside these interpretations is President Franklin Roosevelt's 1940 removal of nearly 72,000 acres, or about 26% of the total area, from the second Grand Canyon National Monument, which President Hoover had proclaimed in 1932.[176] Roosevelt had earlier vetoed a bill to shrink the monument differently, and there was widespread perception that the monument should be adjusted to exclude certain private inholdings; but Roosevelt's action unmistakably assumed presidential power to shrink a monument upon reconsideration of the fit between its purposes and its boundaries, and on a considerably larger scale than in earlier and smaller adjustments to accommodate private property. Although it does not constitute a pattern of Congressional acquiescence to an interpretation of the Antiquities Act that delegates to the executive a power of revision or revocation, it stands as an important precedent of presidential monument revision without repudiation by Congress.

B. The Zenith of Presidential Withdrawal and Reservation Power

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[171] Proclamation of President Wilson, 39 Stat. 1726 (1915).
[172] [early Ruple draft, on file with author]
[173] Proclamation No. 2659, 59 Stat. 877 (1945).
[174] Proclamation No. 3089, 20 Fed. Reg. 2103 (1951).
[175] 236 U.S. 459 (1915).
[176] 54 Stat. 2692 (1940); Proclamation No. 2022 (1932).

The Antiquities Act was adopted in a period of aggressive but contested Presidential withdrawal and reservation. President Theodore Roosevelt in 1903 began a practice of unilaterally declaring "bird reservations" that set aside habitat. The fifty-one reservations that he had created by the end of his second term in 1909 formed the basis of the National Wildlife Refuge System, which now encompasses more than 150 million acres of land and water.[177] These unauthorized presidential reservations overrode congressional privatization statutes that created private rights of entry and acquisition on public lands.[178] Although Congressional acquiescence to these reservations formed an important part of the basis of the Supreme Court's finding of an implied Presidential reservation power in *Midwest Oil*, no statute formally delegated the power to create them.[179] The custom for decades was that proclamations of wildlife refuges either declared a new refuge without reference to any basis of the power or simply invoked "the authority vested in me as President of the United States."[180] As we shall soon see, much turned on the scope of the latter power, which the Roosevelt Administration in particular asserted as the basis of its public-lands decisions.

Despite its boldness in creating wildlife refuges, Theodore Roosevelt's Administration did not move to create national monuments without explicit Congressional authorization. The reasons for this are not entirely clear, but almost certainly included the general impression, evident in the legislative history and subsequent administration of the Antiquities Act, that monuments resembled national parks, which had always been congressional creations.[181] They likely also included awareness of Congressional skepticism of sweeping Presidential reservations, even in multiple-use categories such as national forests, which did not limit privatization as sharply as monuments declarations did. Although the President in 1906 had enjoyed unilateral power to create national forests for most of two decades under congressional acts of 1891 and 1897, Congress forbade future unilateral national forest designations in 1908, spurring a midnight session in which Theodore Roosevelt and his chief forester, Gifford Pinchot, reserved tens of millions of acres the night before Roosevelt signed the bill.[182]

Congress passed the General Withdrawals Act (Pickett Act) of 1910 with the ostensible aim of clarifying the scope of Presidential power in this area; the effect, however, proved to be quite the opposite. Congress acted at the behest of President Taft, who sought clarification

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[177] [RSS 149]

[178] *See* Midwest Oil at 469 (referring to the many cases in which "the Executive, by a special order, has withdrawn lands which Congress, by general statute, has thrown open to acquisition by citizens"). It was for this reason that three justices dissented from the Court's opinion, led by Justice Day. [Contrast the Steel Seizure Cases & note how strong a presidential assertion of power was embraced here.]

[179] See Charles F. Wheatley, Study of Withdrawals and Reservations of Public Domain Lands 244-45 (1969) (for the Public Land Law Review Commission).

[180] *See*, e.g., Exec. Order No. 4851 (establishing Upper Klamath Wildlife Refuge) (Pres. Coolidge, Apr. 3, 1928) ("it is hereby ordered that the unappropriated public lands … are hereby reserved and set apart … as a refuge and breeding ground for birds and wild animals"); Exec. Order No. 6924 (establishing Lake Mattamuskeet Wildlife Refuge) (Pres. Roosevelt, 1934) (reserving lands "by virtue of and pursuant to the authority vested in me as President").

[181] [Legislatively entwined with proposals to permit the President to create parks, and administratively treated afterward as resembling parks.]

[182] [historical citation]

on the extent of Presidential power following his controversial 1909 withdrawal of oil-producing lands from mineral-leasing programs.[183] The resulting legislation authorized the President "temporarily [to] withdraw from settlement, location, sale, or entry any of the public lands" and to "reserve the same for … public purposes to be specified in the orders of withdrawal."[184] Debate ensued over whether the Pickett Act had simply affirmed a power of temporary withdrawal that operated in parallel with whatever other powers the President might hold over public lands, or instead represented an exhaustive account of the President's power in the field, precluding subsequent withdrawal or reservation except on its express authorization or that of another statute.[185]

This question came to a fine point in a clash of legal and bureaucratic giants within Franklin Roosevelt's Administration. The Pickett Act required that lands withdrawn under its authority remain open to hard-rock mining, and President Roosevelt sought to withdraw public lands in Oregon from the operation of the mining laws as well as other extraction regimes. Attorney General Robert Jackson, asked to assess the legality of the proposed action, initially concluded that the Pickett Act was intended to occupy the field and thus excluded any further implied or inherent power--which would have to provide the basis of the proposed mining withdrawal, as such withdrawal had no statutory foundation.[186] Besides citing legislative history suggesting that the Pickett Act was intended to "clearly define the extent of [withdrawal] authority," Jackson argued, "If … the President [had] an unrestricted, inherent power to withdraw lands from the public domain for public purposes, he could avoid, *in every instance*, the restrictions upon his statutory power by simply ignoring the withdrawal statute and acting upon his non-statutory, inherent power."[187] Such a power, Jackson contended, would make the withdrawal and reservations statutes of public-lands law merely advisory, a strange result for a field of law founded on the Property Clause's grant of power over the public lands to Congress.

From the Department of the Interior, Harold Ickes shot back, "The President in the exercise of his presumed inherent general withdrawal power has issued approximately 268 Executive orders of withdrawal since 1910 …. It is imperative that lands set apart for national defense and other purposes should be subject to the exclusive use and jurisdiction of the Federal Government."[188] Henry Stimson, the Secretary of War, chimed in, warning of "inconvenience and embarrassment" if lands withdrawn for military purposes were subject to private mining claims, and Thomas Emerson, a legal anchor of the New Deal who would go on to argue *Griswold v. Connecticut* and teach for three decades at Yale Law School, wrote a special memorandum from within the Attorney General's office, arguing against Jackson's conclusion.[189] At first Jackson stood his ground, reiterating his earlier arguments

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[183] Wheatley at …
[184] Act of June 25, 1910, 36 Stat. 847 (1910) (repealed 1976).
[185] Wheatley at …
[186] Letter of Attorney General Robert Jackson to the Secretary of the Interior, July 25, 1940.
[187] Id. at 4 (emphasis original).
[188] Letter of Interior Secretary Harold Ickes to the Attorney General, Feb. 13, 1941, at 4-5.
[189] Letter of Henry Stimson, Dec. 21, 1940; Memorandum of Thomas Emerson to Charles Fahy, Asst. Solicitor General, May 9, 1941 (arguing that the Pickett Act, in referring only to "temporary" withdrawals, left undiminished an executive power to make permanent withdrawals from and reservations

in reply to Ickes.[190] On June 4, 1941, under intense pressure, he reversed his position and submitted an official opinion agreeing with Ickes and Emerson that the Pickett Act left undisturbed a distinct Presidential power to reserve public lands permanently.[191] It is not clear whether Jackson changed his mind or only his position: he submitted his own earlier letter alongside his final opinion, noting in a cover memorandum that "the question is important and may be said to be close."[192] In the final opinion, Jackson recited, then repudiated, his former view that the President's asserted general power of permanent withdrawal would leave no purpose for lesser statutory delegations of withdrawal power; but he did not refute it, instead blandly noting that the President could choose to exercise a lesser, statutory power if he saw fit.[193] At other points, the final opinion simply adopts portions of Thomas Emerson's earlier text.[194] Eight days after the opinion, on June 12, 1941, President Roosevelt nominated Jackson to the Supreme Court, and he took the oath of office on July 11, less than a month after his nomination.[195]

Six months and a week after Jackson reversed his opinion and adopted the Ickes-Emerson line, the country was at war, and any concern with the niceties of Presidential control over public lands was eclipsed. From then until the adoption of FLPMA in 1976, the official view of the Executive Branch was that the President (and by delegation the Secretary of the Interior) could withdraw or reserve lands permanently for public purposes.[196] Indeed, it seems to have been the position of most of the Executive Branch, emphatically including Ickes's Interior Department, well before Jackson came around to it. As Charles Wheatley judges in his comprehensive assessment of the withdrawal power before FLPMA, "At least from 1934, it appears to be the practice of the Executive in making … withdrawals which are not specifically requested by statute, but are made in his discretion, to cite both the Pickett Act and the President's general inherent authority as the legal basis for the withdrawal."[197] Wheatley noted that the Pickett Act was itself generally treated as authorizing indefinite withdrawals, "temporary" only in the sense that they were subject to later revocation by Congress or the President, so the "inherent" authority was coextensive with it except where

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of the federal public lands). *See also* Glenn Fowler, *Thomas I. Emerson, 83, Scholar Who Molded Civil Liberties Law*, N.Y. Times, June 22, 1991 (obituary of Thomas Emerson).

[190] Letter of Attorney General Robert Jackson, April 11, 1941.

[191] *See* 40 U.S. Op. Atty. Gen. 73 (U.S.A.G.) (June 4, 1941).

[192] Memorandum of Attorney General Robert Jackson, June 4, 1941.

[193] *See* 40 Op. Atty. Gen. 73 at 81.

[194] *See id.* at 83 (adopting portions of Emerson's memorandum of May 9, 1941 concern the "practical results" of constraint on the executive branch that might follow from a contrary opinion).

[195] I am aware of no evidence that Jackson's nomination was conditioned on his concession of the withdrawal power issue. As I indicate in the body text, however, it does seem to me that Jackson regarded himself as more nearly outvoted than out-argued. Ickes clearly wanted this general withdrawal power, and outflanked Jackson bureaucratically to ensure that it became executive-branch policy in a time when Roosevelt enjoyed substantial congressional majorities and a rising concern with war soon eclipsed the finer points of public-lands powers.

[196] See E.O. 10,355, Fed. Reg. 4831 (May 26, 1952) (order of President Truman delegating to the Interior Secretary ("the authority vested in the President by [the Pickett Act] and the authority otherwise vested in him to withdraw or reserve lands … for public purposes, including the authority to modify or revoke withdrawals and reservations of such lands heretofore or hereafter made").

[197] Wheatley at 126.

withdrawals extended to mining, in which case the inherent power was taken to kick in.[198] This "inherent" power was little theorized in its later uses, other than invocations of *Midwest Oil* and Executive practice. In the disputes leading up to *Midwest Oil*, it was generally formulated as a "stewardship" power in the President to protect the public lands on behalf of Congress, which had undisputed ultimate authority over them under the Property Clause.[199]

This historical exposition sheds light on the substantial monument reductions of the first fifty years of the Antiquities Act. Never tested in court, they took place in a legal landscape in which specific statutory authorizations of withdrawal and reservation coexisted with a widely accepted Presidential power to accomplish the same on other, imprecisely unspecified grounds. There was little clear difference, if any, between what the President might do under the Antiquities Act and what he might do through the latter implied power; as we have seen, Attorney General Jackson thought there was none, and that this was evidence of the trouble with the Administration's theory of Presidential powers. If Jackson's analysis of the implied-powers question were correct, then the Grand Canyon reduction was part of a general program of maximizing the President's discretion over public lands, and not necessarily a reliable guide to interpreting the statute. In either case, the main point is that Roosevelt's capacity to put the stamp of legality on his Grand Canyon reduction was overdetermined by a legal landscape in which the President successfully asserted a robust set of powers for reclassifying public lands.

Nonetheless, even the most aggressive account of Presidential discretion in public-lands reclassification featured the asymmetric preference for preservative decisions: the whole purpose of the President's power was to hold open Congress's options for ultimate disposition of the land. This is consistent with the Court's analysis in *Midwest Oil* and, indeed, very nearly a consequence of the Property Clause's assignment of public-lands power to Congress: the President's power must be in service of Congress's, either by delegation or by implied power of preservation. This asymmetry is consistent, too, with the preference for keeping resources in categorical preservation status once they are assigned to it that I described in Part III.C, above. In these respects, public-lands law is consistent across its eras.

C. FLPMA's Re-Consolidation of Congressional Power

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[198] See Wheatley at 128-29.

[199] *See*, e.g., 1 Dept. of the Interior Ann. Rep. 12 (1908) ("If there be no power to affirmatively provide for the ultimate use or disposition of the public domain in accordance with the need to the public welfare, it is the duty of the Executive to temporarily prevent its acquisition until Congress may have an opportunity to consider the question and adopt appropriate legislation…. [Such withdrawals over the country's history] were purely the acts of stewards farsighted enough to foresee and protect the interests of their principal, the people of the United States."); Brief for Appellant at 16-17, United States v. Midwest Oil Co., 236 U.S. 459 (1915) ("When … necessity and has not been anticipated by legislation … and … occurs at such a time and in such circumstances that it would be unwise and dangerous to defer action, the duty to set apart the required tracts (subject to the future disposal of Congress) devolves with all its weight upon the President.").

Within this basic consistency, public-lands law underwent a profound transformation with the adoption of FLPMA in 1976. The organic act for the Bureau of Land Management imposed a multiple-use planning system on lands administered by the Bureau of Land Management (BLM), which had previously operated under a patchwork of entry-and-extraction statutes against a backdrop of substantially unrestricted public access.[200] It expressly withdrew the implied delegation of power that the Court recognized in *Midwest Oil*, alongside twenty-nine statutory provisions for Executive withdrawal.[201] The effect was to leave the Antiquities Act as the only basis for extensive Presidential reservation of public land (or extensive withdrawal outside certain procedures for the temporary withdrawal subject to close monitoring by Congress).[202] The President's discretionary withdrawal power under the Antiquities Act stands in vivid contrast to the limited and closely supervised FLPMA withdrawal power. With large and permanent presidential withdrawals channeled to the Antiquities Act, it is unsurprising that the decades since 1976 have seen millions of acres of land and hundreds of millions of oceans acres designated as national monuments.

Applying some familiar canons of construction strictly, Congress's silence might suggest ratification of prior presidential practice and executive branch interpretation. This might imply approval of the previous Presidential monument revisions as based in proper interpretation of the Antiquities Act and of Attorney General Cummings's opinion that the President cannot revoke a prior monument proclamation. Three considerations, however, suggest otherwise.

First, the substantial monument reductions in the early decades of the Antiquities Act were at best problematically compatible with Cummings's view that reductions were valid when in service of the "smallest area" requirement. As I have been arguing, they are better seen as having needed bolstering by the implied powers recognized in *Midwest Oil*. They need not be understood as having relied on the Antiquities Act.

Second, although Congress in FLPMA did not amend the Antiquities Act, it very substantially changed the place of the Act's delegation within the field of public-lands law, from a means of accomplishing something the President could do by multiple paths to a unique outcropping of unilateral Presidential power. (One might say that if the Antiquities Act were a geological feature on the metaphoric terrain of public-lands powers, after FLPMA it would, like certain buttes and sky islands, be eligible for its own protection.)

Third, it is not clear that Congress did in fact intend in passing FLPMA to leave the Antiquities Act just as it had been. The House Committee's Report on the bill claims, "It would … specifically reserve to the Congress the authority to modify and revoke

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[200] [cite to FLPMA planning sections; TGA, e.g.; the HCN description of people doing what they wanted before 1976; maybe Gates on this?]

[201] *See* Pub. L. No. 94-579, sec. 704(a) (1976) ("Effective on and after the date of approval of this Act, the implied authority of the President to make withdrawals and reservations resulting from the acquiescence of the Congress (U.S. v. Midwest Oil Co., 236 U.S. 459) and the following statutes and parts of statutes are repealed….").

[202] [Details of these in FLPMA]

withdrawals for national monuments created under the Antiquities Act[.]."[203] The portion of the report refers to Section 204(j) of the bill as presented on the House floor, which reads as codified: "The Secretary [of the Interior] shall not … modify or revoke any withdrawal creating national monuments under [the Antiquities Act]."[204] This is, on its face, a puzzling prohibition, as the Act had never contained an authorization to the Secretary to exercise any power under its terms. The Secretary had, however, enjoyed a delegation of Presidential withdrawal power since 1952 under the very broad terms of E.O. 10,335, which might have led to drafting confusion about whose power was at issue.[205]

Section 204(j) might be read as either (1) acknowledging that the President could modify or revoke Antiquities Act reservations but denying that power to the Secretary despite E.O. 10,335; or (2) denying the Executive Branch the delegated power to modify or revoke monument proclamations, but under a mistaken apprehension of where in the Executive that power would be lodged if it existed. [206] It might also be (3) a ghost of the drafting process. The drafting of section 204(j) was contemporaneous with a version of the bill that would have transferred the power to create national monuments from the President to the Interior Secretary. The latter proposal was withdrawn in the face of objections from the Ford administration.[207]

Whichever it is, FLPMA in the end let the Antiquities Act stand without amendment. But it did not leave the field unchanged. It wiped out a panoply of express and implied Presidential powers to reclassify public lands and left only its own temporary withdrawal procedure and the Antiquities Act. In post-FLPMA public-lands law, the survival of the Antiquities Act is anomalous, though it is plainly an intended anomaly. To interpret it as authorizing the President to strip the protected status of substantial monument lands would create a much greater anomaly, one cutting against the Congressional consolidation of power in FLPMA, the aversion to precipitate Executive privatization (with its invitation to corruption), and the principle that only Congressional action can remove lands from categorical protection once they enter it.

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[203] H.R. Rep. No. 94-1163, at 9 (May 15, 1976).

[204] 43 U.S.C. 1714(j). It reads in full, "The Secretary shall not make, modify, or revoke any withdrawal created by an Act of Congress; make a withdrawal which can be made only by Act of Congress; modify or revoke any withdrawal creating national monuments under [the Antiquities Act]; or modify or revoke any withdrawal which added lands to the National Wildlife Refuge System prior to [FLPMA's adoption] or which thereafter add lands to that system under the terms of this Act."

[205] See supra n. __.

[206] Professors Squillace, Biber, Bryner, and Hecht (henceforward Squillace et al.) argue that the reference to "the Secretary of the Interior" in sec. 1714(j) "may be a drafting error," and that the text ought to have referred to the President, because "section 204(j) was intended to reserve to Congress the exclusive authority to modify or revoke national monuments." Mark Squillace, Eric Biber, Nicholas Bryner, & Sean Hecht, *Presidents Lack the Authority to Abolish or Diminish National Monuments*, 103 Va. L. Rev. Online 55, 60-61 (2017).

[207] *See id.* at 61-64. On the interpretation of Squillace et al., the reference in 204(j) to the Interior Secretary was originally paired with the later-withdrawn amendment to the Antiquities Act, and would have achieved a consistent policy of restricting revocations and modifications of land withdrawals to Congress except for those ordered under the process set out in FLPMA.

D. Early Presidential Revisions in the Arc of Public-lands Law

The Executive-branch precedents for substantial monument revision, then, date back to a time of far more expansive Presidential authority over the public lands. The powers asserted in that period were in some tension with the coherence of public-lands law overall. Soon-to-be Justice Jackson made a good case that they were incompatible with it, which was never really answered even though he abandoned it as a lost cause in bureaucratic infighting. Whatever their theoretical excesses, however, these powers were generally rationalized as Executive "stewardship" of Congress's final authority over public-lands classification, and were asserted in exercises consistent with the premise against Presidential privatization. They account for the early, substantial Presidential revisions of national monuments in ways that make Antiquities Act authority nugatory for those. These powers are also consistent in the substance of their exercise, if not always in the Roosevelt Administration's maximalist and inexact articulation, with the general structure of public-lands law.

Interpreting the Antiquities Act's delegation of power today--the first time it has been adjudicated--is an opportunity to fit its ambiguous text within the structure of post-1976 public-lands law. Doing so is not simply a matter of choosing a present-oriented interpretive strategy over an originalist one or emphasizing the coherence of the field rather than concentrating on the text of the statute. Rather, the bare original text of the Antiquities Act is ambiguous on the scope of power to revise or revoke monument proclamations, and all but requires a larger picture of how public-lands governance should work to lend it meaning. Unchallenged Executive practice under the statute is good evidence on that issue; but, as we have seen, that practice was part of a legal era in which the Executive branch enjoyed a panoply of discretionary powers of reclassification, including key powers that were legally dubious but unchallenged in the politics of the era. Congress withdrew those powers in 1976, leaving the Antiquities Act the sole basis of unilateral Executive reclassification of public lands, and setting it within an overarching policy of Congressional primacy in public-lands classification.

VI. Conclusion

The Trump Administration presents a delicate question for legal analysis. On the one hand, blandly conventional legal analysis risks normalizing the Administration's departure from basic liberal and procedural norms. On the other hand, legal analysis risks its distinctive status as professional reason if it sets itself *a priori* against an Administration. The goal here is to keep political and moral judgments in view while asking how distinctively legal concepts can help in grappling with the present moment.

In its monuments proclamations, the Trump Administration asserts a sweeping power to reclassify fifteen million acres of protected federal land and hundreds of millions of marine acres. The proclamations already issued, which purport to strip more than a million acres of monument status, are redolent of this Administration's illiberal and procedurally dubious tendencies. They elevate to federal policy the themes and goals of a strand of Western populism that is tainted with outlawry and racism. The proclamations also cater to extractive industries, particularly uranium, oil and gas, and coal, in ways that resonate with

the Trump Administration's relentless mixing of public wealth and private interest--in a phrase, its penchant for corruption.

The burden of my argument has been that legal analysis of the monuments proclamations can take account of these facts by showing how the proclamations fit within the larger and theoretically neglected terrain of public-lands law. Corruption is not a novel concern here. For well over a century, the field has been shaped by recognition that precipitate and opportunistic privatization is a perennial temptation in a body of law that governs nearly a third of the country's acreage and a great deal of its natural wealth. The Executive branch's capacity for rapid, unilateral, and obscure action makes it especially suited to this form of misappropriation. Recognition of these facts is built into public-lands law in the long-standing asymmetric preference for Presidential power to preserve lands over Presidential power to privatize them. That preference finds expression in statutory structure (e.g., the Pickett Act, FLPMA), jurisprudence (e.g., *United States v. Midwest Oil*), and executive-branch analysis (e.g., the opinions of Attorneys General Cummings and Bates). It also informs the larger pattern of powers in public-lands law. Understanding that pattern helps to show why the Antiquities Act would be sharply anomalous if it were read today as authorizing substantial and unilateral Presidential de-classification of monuments. The kind of opportunistic favoritism that the Trump proclamations display is precisely what public-lands law has been structured over centuries to avert. These proclamations are paradigms of *why* unilateral Presidential reclassification toward privatizing natural resources would be anomalous in public-lands law. A Court would properly consider the anomaly in deciding whether the power to create national monuments should imply the power to unmake them.

In the case of the Trump proclamations, the question of opportunism and favoritism in reclassification decisions interacts with the influence of racially inflected nationalism and localist outlawry on the Administration's priorities. Here too, as with corruption, these themes are not novel or alien to public-lands law. Extractivism, settler-colonialism, and the priority of property-style resource claims and local control are, in key ways, continuations of the themes that governed the first hundred years of public-lands law. Their constituencies have never left the field. It is partly because of these constituencies' persistent opposition to preservation agendas that public-lands law has always been inflected by disputes over national identity, from the utilitarian nationalism of Gifford Pinchot and Theodore Roosevelt's national forests to the national parks' much-advertised status as the American answer to Europe's cathedrals to the claim that wilderness preservation would keep the country from becoming a "cage."[208]

Here too, public-lands law has been shaped by grappling with the themes that the Trump proclamations raise. And here too its shape contains a good part of an answer. The public-lands populists' claims on behalf of privatizing and extractive policies already have a specific legal expression that is deeply embedded in public-lands law: in long-standing public rights-of-way across the federal lands of the West, in mining and mineral-leasing regimes, in grazing rights, and in the default policy of extensive public recreational access--and, above all, in the private real estate that was substantially created under federal

[208] *See supra* n. __.

privatization schemes.[209] In other words, these claims do not come from outside public-lands law. They are part of it, and they occupy a specific place in its structure. Where they have been vested, they tend to persist within new regimes that otherwise emphasize preservation over extraction and economic use. On multiple-use lands, they play a prominent part in the statutorily mandated planning process. Where, however, they are not vested but take the form of inchoate expectations of continued access, they yield on categorically protected lands: new privatizing and extractive claims are almost uniformly excluded under preservation regimes. For such claims to get traction again, the lands themselves must be reclassified. That reclassification is generally reserved to Congress. If the Antiquities Act authorizes the President to hand a victory to public-lands populists by reclassifying hotly contested lands, then it is a dramatic anomaly in public-lands law. It would authorize constant perennial and shifting reopening of precisely the disputes that the field exists to structure and resolve, and through a mechanism that is procedurally orthogonal to the rest of the field.

The Trump proclamations raise a novel question for interpretation of one of the most important public-lands statutes. Like much that this Administration does, however, it is not so much new as it is an effort to reopen questions that many of us had hoped were closed. In this case, they should remain closed. Well-established principles in the structure of public-lands law give good reason to judge that the President's proclamations are *ultra vires* under the Antiquities Act. All that is necessary is to see them.

[209] RS 2477 inter alia.